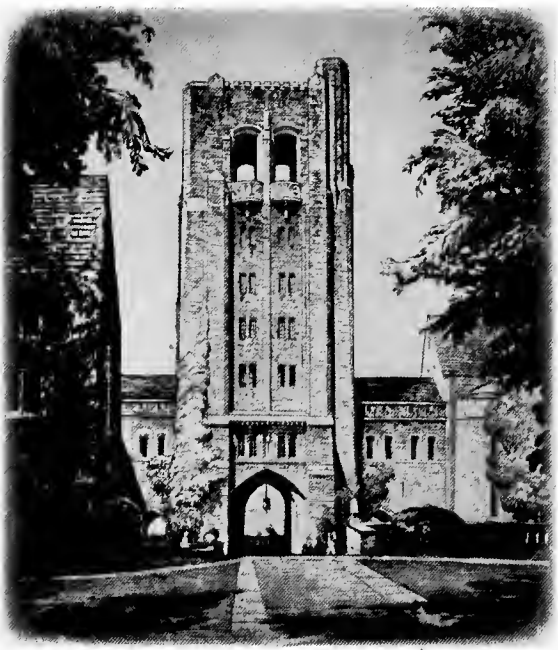

CHANCERY

PLEADING AND PRACTICE IN ALABAMA

WITH FORMS FOR PLEADINGS

BEING AN EXAMINATION OF THE PROCEDURE IN CHANCERY FORMERLY IN USE IN ENGLAND AS AFFECTED BY STATUTES AND SUPREME COURT DECISIONS OF THE STATE OF ALABAMA.

BY

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TO

ALFRED H. BENNERS, ESQ.,

CHANCELLOR OF THE NORTHWESTERN CHANCERY

DIVISION OF ALABAMA.

THIS BOOK IS DEDICATED

as a token of the Author's appreciation of his friendship, long antedating his becoming Chancellor, and reverence for his penetration, openness of mind, and devotion to truth as a judge.

PREFACE.

For nearly a hundred years Alabama legislatures and Alabama courts have been altering and construing the system of procedure in chancery which was obtained from England. And although comparatively few fundamental changes have been made, it is apparent that the Alabama lawyer of today cannot rely solely upon a work on English chancery procedure for the safe guidance of his case. Indeed it has long been realized that the bar in each of the States must provide themselves with separate guides to their procedure, for universal text books upon procedure are no longer reliable for any local practice.

Books upon Alabama chancery procedure have been planned several times by different members of the bar; but pressure of business has prevented some from accomplishing the task, and untimely death has prevented others; and so up to this time the work has not been accomplished. The late Wm. M. Bethea, Esq., of the Birmingham bar was the last to work upon such a book, but working as he did before the appearance of Mayfield's Digest of Alabama decisions, he had not gotten beyond the then necessary labor of digesting the chancery decisions before his death.

The Supreme Court, upon whom has fallen as far as may be the burden of harmonizing the practice over the State, can direct it to only a limited extent at best. For when we realize that they dwell upon the pleadings in a cause only when directly presented on appeal from interlocutory decrees upon them, or when any injustice traceable to the pleadings was not corrected by a final decree upon the merits—and in the latter case only when the error has been assigned by the appellant as ground for relief on appeal—we find that the systematizing of our chancery practice must be done lower down than in the Supreme Court. We should look thither rather for the correction than for the systematizing of our pleading.

If a book upon local procedure is needed, then, it would

seem desirable that such a book be as full as may be, commensurate with the fullness with which the Supreme Court has discussed the different parts of the subject. The particular treatment and conclusions of the Supreme Court of Alabama, and the reason in the modifying Acts of the legislature should be made clear. Therefore the author has not planned a mere reference book or index digest of the chancery decisions and legislative Acts in Alabama; but has attempted to write a text book presenting the different phases of chancery procedure peculiar to Alabama, quoting the wording of the Supreme Court wherever applicable, and arguing to conclusions questions arising not hitherto decided by the Supreme Court.

It is the author's aim that even a beginner in chancery practice, provided he has clearly in mind the class of rights of which equity has jurisdiction, should be able from this book to prepare a bill in chancery in Alabama, and with the aid of the court to conduct the ordinary cause to a safe conclusion. The beginner must not imply from this, however, that such a task would be very easy. Even if the system of Alabama chancery practice were free from all uncertainties, the task of conducting his first suit safely could be accomplished by the beginner only with much study.

But Alabama chancery practice is by no means free from uncertainties. And as probably few of the bar regard our chancery practice as Sir Leicester Dedlock, (whose wife was in Jarndyce v. Jarndyce,) regarded the English original, being "upon the whole of a fixed opinion, that to give the sanction of his countenance to any complaints respecting it would be to encourage some person to rise up somewhere—like Wat Tyler;" it has not seemed over bold to add an appendix to this work, discussing certain apparently desirable changes in our practice.

On the whole, the author fears no criticism for having held the subject of this book a good one; for even a very poor book upon it cannot fail to do some good by directing discussion. Something more than that, however, he trusts is being offered: the decisions will be found, he believes, to have been cited accurately; and where a proposition is stated without Alabama authority, the reader may depend upon it that there is nothing to the contrary in our decisions. Fortunately, such propositions are few; because in the one hundred and

seventy volumes of reports nearly every point of chancery pleading has been touched upon.

In addition to the appendix just mentioned, there has been added an appendix of appropriate forms for drawing chancery pleadings, and another appendix reciting the courts having original chancery jurisdiction in the several counties of the State.

The appendix usually attached to works on chancery procedure containing the rules of practice in force, has been omitted, because the author's study has revealed no fundamental distinction between our statutory rules of practice, and the other statutes applicable to chancery. And to append all the statutory enactments of the Code would be impracticable. And while leaving out the Alabama rules, to attach the rules of English Chancery of 1845, would be dangerous, since they only obtain in the absence of an Alabama rule or decision to the contrary. Moreover let the non-resident reader not be misled by the term "Code," by which Alabama volumes of revised statutes are called. There is very little codification meant to be contained in them.

The author is indebted to Judge W. S. Thorington, Dean of the Law School of the University of Alabama, and formerly upon the Supreme Court, for the private use of his excellent article upon amendments to pleadings read before the State Bar Association at its last meeting.

Birmingham, Alabama,
May 25, 1909.

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CHANCERY PLEADING AND PRACTICE

CHAPTER I.

INTRODUCTORY.

§ 1. Plan of the work.—It is the plan of this work to make clear the difference between the chancery practice in Alabama and the chancery practice in England, upon which Alabama chancery practice is based. By adopting this plan there is always before the reader a definite model with which to make comparisons, which must be of great benefit to him, as well as to the writer; but there is also the advantage to both reader and writer of not having to elaborate rules of chancery pleading and practice which are not altered by Alabama statutes and decisions. Much of the elaborate and invaluable work contained in Daniell's Chancery Practice, for example, is as good law for Alabama lawyers as it was for English lawyers; and the reasons there given for the conclusions made are almost always so clear that to attempt to add to them or even repeat them in other language, where they apply to our pleading, would be useless if not presumptuous. Thus Mr. Daniell gave three hundred and fifty pages of his work to the subject of parties to suits in chancery; and while much of it refers to matters that could not come up in Alabama, a great deal of it covers very fully points both great and small that do come up in Alabama, and covers them so fully that it were better to refer the reader to Daniell than to discuss it anew. Of course, if an Alabama decision affects the point, that decision must be found and considered; but upon many questions which have been carefully elaborated by Daniell no decisions by the Supreme Court of Alabama have been made; and it is probable that Mr. Daniell's work has saved us from having to obtain them.

§ 2. Alabama chancery pleading and practice defined.—By Alabama chancery pleading and practice is meant both the

procedure which must be followed and the procedure which may be followed in the conduct of causes in courts of equity jurisdiction in the State of Alabama. And while a great deal of the procedure customarily followed in chancery in Alabama is considerably at variance with the chancery pleading in England, it is believed that the instances in which English pleading could not be used are comparatively few. Certain principles of procedure have become established in Alabama different from the old procedure in England; and those must be identified and understood. But with those principles learned, the practitioner in Alabama is ably prepared for the fray if he keeps Daniell's Chancery Practice at hand. That scholarly work is used as the guide to English practice for this book, and reference to it will be made where no Alabama statutes or decisions are in point. It has been thought best, too, to use for this reference the second American edition of Daniell, edited by J. C. Perkins from the second English edition, being the American edition of 1851. This edition discusses the English Rules of May, 1845, referred to in the Alabama Rules, contains the elaborate chapter on "parties," omitted in the third edition, and is probably more generally scattered throughout the State than any subsequent edition.

§ 3. Four cardinal differences between Alabama and English systems.—Four cardinal features must be remembered which distinguish chancery pleading in Alabama from the chancery pleading in England upon which all American chancery pleading is based. Familiarity with these four features and their bearing upon the English original, will prevent all surprises to the pleader, who may otherwise proceed in his cause following the old English pleading and practice without fear of falling into great error. Of course our rules in Alabama as to the time for pleading and as to the manner of calling up causes, taking testimony, giving notice, and pursuing strictly formal matters, are purely our own; and no one should attempt to carry on a cause without having the Alabama rules and statutes before him. But provided the pleader respects the four cardinal features referred to, his conforming to the English practice instead of conforming to ours, would

generally merely delay a cause, rather than radically affect it. And so until the pleader has learned the value of other modifications of the English practice which it is his privilege to make, and has become familiar with the purposes for which the statutes authorizing them were made, he would do well to observe the English system which supported the labor of the fathers of equity and which is supported at each step by a reason recognized by every lawyer and fully explained by Daniell and Mitford and Story. Much of it may be avoided, but little of it has been abolished.

§ 4. Old and modern English systems distinguished.—By English chancery pleading, however, is not meant the system in vogue in the English courts today. Since the courts were all combined in England in 1875,[1] there has been no chancery pleading there in the sense that it existed before that time. The English system was so completely changed by the first Judicature Act of 1873 and the many subsequent Acts on the subject, that it has no longer any similarity to ours at all, just as pleading at common law was totally abolished in England at the same time. Whether such radical changes were wise or unwise in themselves does not concern us until we undertake to adopt a new system of legal procedure, but in the meanwhile the happy effect of the English Judicature Act of 1873 was to leave a system of chancery pleading complete in itself, crystallized as the Latin and Greek languages were crystallized when the nations who used them were blotted out of existence. Therefore so long as we choose to use English chancery practice we can study something definite. True, the rules of practice in English Chancery after 1845 are not recognized in Alabama, since the rules ordained in England in that year happened to be in force when we passed a rule that the English rules of practice then in vogue should obtain with us in the absence of Alabama statutes or decisions to the contrary.[2] But there was no very radical change in chancery practice in England from 1845 down to the Judicature Act of 1873, or certainly not until 1865, the beginning

[1] The Judicature Act went into effect Nov. 2, 1875. See Ency. Brit. Vol. XXX, 143.

[2] See Rule 7 of Rules of chancery practice, Ala. Code of 1907.

of the publication of the English decisions under the present form of the Law Reports. So that the rules and cases prior to those published in that set of reports may be looked to as guides to us in any puzzling emergency.

§ 5. The four cardinal differences named.—Assuming English Chancery pleading then to mean the pleading in vogue in England down to 1845 or 1865, ours differs radically from it in four respects: First, causes in chancery in Alabama are strictly between the parties introduced into them, just as causes at law have always been; second, and as a natural consequence from that difference, the plaintiff may at his option release the defendant from pleading under oath; third, the jurisdiction of chancery, and therefore the procedure, completes the cause without referring it to law for any collateral trials; and fourth, all available defenses may be incorporated in the answer and be pleaded at once. Let these four propositions be gone over carefully and their distinguishing characters analyzed.

§ 6. First cardinal difference between Alabama and English systems.—I. Causes in chancery in Alabama are strictly between the parties introduced into them. Students of early chancery history tell us that relief in chancery originated in appeals to the King of England by his subjects who suffered from grievances which were beyond the arm of the established courts.[3] Indeed one entire field of commonly recognized property rights, that of uses and trusts before the statutes abolishing uses, was entirely beyond the reach of the King's courts. Before the statute of 27 Henry VIII, chapter 34, which is known as the Statute of Uses, there was a very large proportion of the lands of England the titles to which were held by persons who had no real interest in them. They came by them either by direct grant or devise as trustees, or by deed of feoffment with the trusts concealed; but in either case their titles were as absolute as titles at this day. There was always some ulterior reason for the trust or confidence, either to bestow the benefits of the lands upon the church, which could not receive title to them on account of the stat-

[3] Langdell Eq. Pleading § 37. Cf. Story Eq. Jur. Vol. I, §§ 45, 48.

utes of mortmain, or as was frequently the case, to avoid many of the legalized extortions of feudal tenure; for if the trustee lived up to the trust, he would give the young boy or girl for whose benefit the trust was created the full benefit of the estate he was holding for him, and thus save for the child the large share which the lord could exact at Common Law when the minor became of age or married.

§ 7.——Of course this absolute conveyance of one's lands to another when no actual gift to the grantee was intended, must have required a high standard of reliability in the grantee and great confidence on the part of the grantor that the grantee would regard it as a trust. For no beneficiary except the church, which had the ever available power of excommunicating the trustee, had any way to enforce his intended rights. But in time the King and his chancellors, who originally acted merely in his stead, began to recognize these trust rights when appealed to for aid by seizing recalcitrant trustees and imprisoning them until they were willing to observe the terms of their trusts. And although the enforcement of trusts probably had nothing to do with the origin of equity jurisidiction, that it operated as the most potent factor in the maintenance and development of equity jurisdiction may be asserted without qualification.[4]

§ 8.——These appeals to the King or to his deputy, were made by petition, and this petition was essentially to the King's prerogative.[5] The King was begged to exercise the same function that a parent or master exercises when one child tells of another's misdoings and begs that the other be made to do right. And the appeal being made to a protector, in determining the necessity for the exercise of the King's personal jurisdiction, it was of course a mere incident of the cause that the party complained of should have an opportunity to speak in defense. Indeed, when impending aggression was complained of, temporary relief by way of injunction was often granted without notice to the defendant. But the

[4] 1 Story Eq. Jur. §§ 45, 49, where the authorities are collected; 3 Blackstone Com. 51.

[5] Langdell, Brief Survey of Eq. Jur. 23. Cf. 3 Blackstone Com. 54 and note f.

King or his Chancellor would have to be satisfied by the petitioner that a wrong had been done, or was about to be done, before he would do anything for him; at first doubtless even before he would summon the defendant to come to the court. Hence the natural consequence of this relation of the courts to the parties was that if the defendant were summoned and did not come, and the various compulsory processes including imprisonment were ineffective to obtain an answer, the court required the plaintiff to prove his cause just the same.

§ 9.——And this was English chancery procedure down to modern times. Though the court would enter a decree at the request of the plaintiff against a defaulting defendant reciting that the facts as set forth by the plaintiff in his bill or petition should be taken as confessed, this decree pro confesso, as it is called, had no essential effect in early English practice except to cut off the defendant against whom it was taken from introducing any evidence in defense[6]: unless after showing good cause within a given time and complying with terms he could prevail upon the chancellor to set the decree aside. It is true that it later came to be law in England that where the defendant was in prison for refusal to answer, a decree to suit the plaintiff after a decree pro confesso could be obtained without proof; and in time all conditions were abolished by statutes and rules of practice, and a decree pro confesso amounted to proof of all the allegations constituting the equity of the bill. But the defendant was still deemed in contempt.

§ 10. First cardinal difference (continued).—But all this is fundamentally different in Alabama. Here when a bill has been taken as confessed against defendants capable of confessing, not only is the necessity of proof of the bill dispensed with, but the defendant is not in contempt, and can

[6] 1 Daniell Ch. Pr. 569; Johnson v. Dismineere, 1 Vernon 223, circa. 1683. Prior to that time a decree pro confesso did not avoid proof of the substance of the bill, but from then on it sufficed for a complete dispensing of proof of facts which made up the equity of the bill. The history is reviewed by Chancellor Kent in Rose v. Woodruff, 4 Johns. Ch. 547.

still make certain defenses;[7] and so complete has been the acceptance by the court of the confession, that on submission of the cause after a decree pro confesso it is not necessary to make a note of the testimony, a formality necessary in litigated causes as we shall see, in order to make the testimony legal evidence. It has been thought by practitioners that in certain causes like bills for partition, or bills for sale for division, it would be necessary for the plaintiff to make proof of his part ownership, and if a sale is prayed for, to make proof of the indivisibility of the land; but in the light of the decisions upon the effect of the decree, there would seem to be no need to make any proof whatever. And certainly there is no clear way to distinguish what allegations need be proven and what need not be.

§ 11.——This effect of a decree pro confesso in Alabama dates back to 1841; and at first no decree pro confesso could be taken except on the defendant's failure to answer after personal service, the law providing that the chancellor shall give the same order or decree thereon as if answer had been filed confessing the same, except in cases of infants and idiots and in cases of divorce.[8] In the Code of 1852, however, the effect of the statute was broadened by the wording as we now have it, Code of 1907, sec. 3163,[9] "In all cases in which decrees pro confesso are lawfully taken, the allegations of the bill are to be regarded as admitted," except in certain cases; and the significance of the decree has been lost. But whatever the origin, the principle is now thoroughly established in our system of pleading, that to prevent the plaintiff from

[7] Madden v. Floyd, 69 Ala. 222; Mobile Savings Bank v. McDonnell, 87 Ala. 736, 750; Code of 1907, § 3166. Early Alabama statutes provided, however, that the plaintiff must satisfy the court of his right to relief even after decree pro confesso. Arnold v. Sheppard, 6 Ala. 299; Wellborn v. Tiller, 10 Ala. 305; Carradine v. O'Connor, 21 Ala. 573. That a defendant after decree pro confesso was in contempt in England, See I Daniell Ch. Pr. 570; Prof. Langdell, Eq. Pl. § 84, shows the anomaly of this conclusion, however.

[8] Clay's Digest, 354, § 58.

[9] Code of 1896, § 747. The Code has added "Except in case of infant defendants, persons of unsound mind, executors, administrators, and bills for divorce."

obtaining all the relief which the allegations of his bill may warrant, the defendant must do his own denying and defending. And it will probably become established practice that where an answer is filed, but not under oath, all allegations of the bill not denied or controverted are to be taken as admitted, just as they would be if no answer were filed and they were sustained by a decree pro confesso.[10] But all further argument of the proposition that the litigation is entirely under the control of the parties is dispensed with by the proposition classed above as the second distinction between pleading in Alabama and pleading in England.

§ 12. Second cardinal difference between Alabama and English systems.—II. The plaintiff in Alabama may at his option release the defendant from pleading under oath. In England the defendant's oath could be dispensed with only by consent of the court,[11] which was granted only under certain circumstances; and from the reference to it in Daniell it would seem that an answer without oath was very rare except in amicable suits. Since from the earliest times the relief sought by a bill in chancery was granted only if the chancellor thought a case was presented outside of the jurisdiction of the established common law courts, it would seem to have been important that the allegations in the pleadings should be as near true as an oath was capable of making them. Why the bill was not under oath, therefore, is a natural question. A colorable reason may be found in the probability that any subject who went to the trouble to prepare and file a bill under the rules of the day, would be likely to have some truth in it, the extent of which could be determined after the sworn answer of the defendant had distinguished

[10] There seems to be no Supreme Court decision for this, but it is a natural corollary to the decisions as to the effect of a decree pro confesso. The plaintiff has no recourse if such were not the practice. For if the answer is without oath, the plaintiff cannot except to its failure to cover all the allegations of the bill. Chancery Rule 34, Code of 1907. And the plaintiff has a right by statute to waive the necessity for the defendant to answer under oath. Section 3096, Code of 1907, § 679, Code of 1896.

[11] Langdell Eq. Pl. § 78; 2 Daniell Ch. Pr. 847; Codner v. Hersey, 18 Vesey. 468.

the allegations upon which there was doubt. And that reason is probably the only one consistent with the fact that the actual confessions in the defendant's answer could prove the plaintiff's bill, whereas the silent confession of the defendant, his refusing to answer, would not suffice; for silence may be due to ignorance, whereas averments in support of the bill when made by the defendant are the safest sort of testimony upon which the court could rely.

§ 13.——But this reasoning, both as to the bill and as to the answer, is at best only a plausible theory. There seems to be no positive historical evidence in its support. We know that equity jurisdiction was a part of the King's personal prerogative, because the relief it involved was beyond the scope of the writs conferring authority upon the established courts, and because at an early day it had become impracticable to extend their jurisdiction by the creation of new writs. We know further that the relief grantable in equity was chiefly against the defendant's person, orders for him to obey, and as such similar in form to the relief granted in the already established ecclesiastical courts of England.[12] And we also know that "the English ecclesiastical courts were established by an ordinance of William the Conqueror, upon the model of the spiritual courts which had long existed on the continent of Europe;" the ordinance expressly directing "that the new courts should not be governed by the municipal law of England, but by the Canon law; that is, by the same law which governed all spiritual courts which recognized the authority of the Pope."[13]

It appears then that equity borrowed its mode of giving relief from the ecclesiastical courts; and it also appears that along with its mode of giving relief it borrowed much of its procedure. Professor Langdell says that "in particular it followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses, and in requiring each party to submit to an examination under oath by his adversary."[14] And he further tells us that "in early times, answers were drawn by the masters in chancery, that is, the defendant

[13] Langdell Eq. Pleading, § 23. §§36, 42, 43.

[13] Langdell Eq. Pl. § 23.

[14] Langdell Eq. Pl. § 47.

was examined upon the bill by a master, acting as the chancellor's assistant; and an answer is still in legal contemplation drawn by the master before whom it is sworn. In these respects an answer has always been treated as if it contained only the defendant's examination under oath, its character as a pleading being lost sight of. It is in consequence of this that a defendant always has to swear to his defense, while a plaintiff is not required to swear to his bill."[15]

§ 14.——It would seem therefore a mere incident of equity history that the court always had the oath of the defendant by which to guide its decree of relief. To admit an answer without oath, was to admit testimony unsworn, and for that reason alone was an unwarrantable proceeding. But nevertheless it is true that the chancellor had the oath of the defendant, that is to say the assistance of testimony, in every instance of exercising his extraordinary jurisdiction, and this may well have been treated as a safeguard though its history was obscure.

§ 15. **Second cardinal difference (continued).**—In Alabama the dispensing with the oath of the defendant to the averments of his answer, is an absolute right of the plaintiff without even taking any order of court allowing it. The present statute authorizing this waiver, section 3096 of the Code of 1907, appeared first in the Code of 1852 as section 2877. Prior to that time the defendant's oath could not be dispensed with even by order of court[16]; but since the statute of 1841 had already changed the effect of a decree pro confesso, as we have just seen, so that the suit had already become essentially an issue between the parties; it is not surprising that the Code of 1852 made it completely so by dispensing with the requirement of the oath as well.

§ 16.——But another important effect of the waiver, which was probably the real reason for the law of 1852 allowing it, is its depriving the defendant of using his answer as testimony in his behalf. As we have seen from the quotation

[15] Langdell Eq. Pl. § 81, and the authorities in note.

[16] Clay's Alabama Digest, p. 352 § 41, being section 8 of the Act of 1823, simply requiring that the defendant swear to his answer before an officer qualified to administer the oath.

from Professor Langdell given above, the answer was originally the testimony of the defendant himself, and from its solemnity it possessed a value to the defendant even better than testimony. When it denied any allegation of the bill the plaintiff could not overcome it by less than the testimony of two witnesses, or of one witness and corroborating circumstances.[17] As the answer in English practice had this value for the defendant, it often put the plaintiff into a very dangerous position, for it threw upon him the burden of establishing his bill by a majority in number of witnesses instead of by the credibility of his testimony. Moreover, as is well known, it was not allowable until late statutes for a party to testify in a cause either in equity or at law.[18] So the plaintiff had not only to produce two witnesses to meet the defendant's denial, but he was forbidden to be one of those witnesses himself. Why the practice which allowed the defendant this seeming advantage survived so long in England would at once surprise us.

§ 17.——But a reason is found in the belief that no advantage really existed to the defendant at all. Indeed the plaintiff's solicitor would doubtless have been amazed had one suggested to him that the defendant had an advantage. But for the peculiar practice in chancery the very rule which prohibited the plaintiff from testifying in rebuttal to the defendant, would have prevented him from examining the defendant in the cause. And when we learn that the answer was the examination of the defendant, and that this power to examine the defendant under oath was the great weapon of chancery, we see that it is historically inaccurate to say that the plaintiff by not waiving the oath consents that the defendant's answer be testimony in his behalf.[19] Such was the regard for the oath that the defendant when he swore to his answer almost invariably told the truth, and the details in which memory might honestly fail were not as import-

[17] 2 Daniell Ch. Pr. 983 and note.

[18] 2 Daniell Ch. Pr. 1031; Mobile Savings Bank v. McDonnell, 87 Ala. 736, 740.

[19] The statement is often made that the answer under oath is testimony by consent of the plaintiff. Agnew v. McGill, 96 Ala. 496; 2 Story Eq. Jur. § 1529.

ant as the assurance that the strength or weakness of the defendant's position in the cause was laid bare. That the oath had much greater influence over an affiant fifty or sixty years or more ago than today, need be proven by no citations. All our histories bear witness that a great fear not only of eternal punishment, but also of divine personal chastisement in this life for acts which conscience forbad, dominated the minds of all classes until very recent times. It would be difficult to prove that the popular fear of stating falsely under oath existed generally longer in England than with us; but the few decades that the oath survived there after the time that Alabama practice allowed general waiver of it, may well be accounted for in the fact of established practice in England; whereas our practice was new, and we were allowed that opportunity attendant upon beginning over again to reform what may have become of doubtful value.

§ 18.——But even if the oath has long been incapable of preventing an artful and fraudulent defendant from answering falsely, it must not be overlooked that the necessity for the defendant to swear, has a great influence upon his pleader. Occasions of conspiracy to falsify between the defendant and his solicitor are rare. In the vast majority of cases the answer under oath and its defenses would conform to the report of the facts furnished by the defendant, and the extent of their falsehood would be known only to him. Whereas when the oath is waived, the answer often degenerates to the scandalous misrepresentation inherent in common law pleading, where the defense upon which the defendant actually relies can never be known until all his testimony has been offered.

§ 19.——It was doubtless to check a growing tendency to irresponsible answers in chancery that the commissioners compiling the Alabama Code of 1896 devised the plan formulated in section 680,[20] of dispensing with the requirement of two witnesses to disprove an answer under oath where the plaintiff had sworn to his bill. This would seem to be an excellent device and one that should be generally adopted by plaintiffs. But it has not been much availed of as yet, and the custom is almost universal in Alabama for the plaintiff to

[20] Code of 1907, § 3117.

relieve the defendant from answering under oath except in causes for discovery, where the statute does not allow the waiver to be made.

§ 20. Third cardinal difference between Alabama and English system.—The third difference between Alabama chancery procedure and the old English procedure is that in Alabama the jurisdiction of chancery and therefore the procedure extends to the completion of the cause without referring it to a law court for any collateral trial.

It is not meant by this that a court of chancery in Alabama will assume a cause not within the range of equity jurisdiction; nor that if it appears from the pleading or evidence that the plaintiff has a remedy at law, the court of chancery will not stop the cause and require the plaintiff to seek his adequate relief in the law court. What is meant is that where a right to relief in equity is shown by the plaintiff in his bill provided certain legal rights exist, the chancery court will not require him first to establish these legal rights in an action at law before assuming jurisdiction of his cause, but will allow him to establish all his involved rights in his cause in equity. Again, where the plaintiff has been granted relief in chancery, and he is further entitled to damages for certain trespasses by the defendant on account of which the equitable relief was obtained, an Alabama court of chancery will not require him to obtain these damages at law. The former instance refers to cases where in England "feigned issues" and "issues out of chancery" were required to establish irreparable injury or trespasses upon which injunctions were sought; and the latter instance refers to cases where injunctions have been granted against future injury to the plaintiffs, and they are entitled to pecuniary remuneration for past injuries similar to those prevented as to the future by injunction.

§ 21.——It must be noted that the action of the court of chancery in establishing facts in the former class of cases is purely a matter of procedure; just as it is purely a matter of procedure for a court of chancery to issue a writ of possession to put a plaintiff into possession of a parcel of real estate after the title to it has been settled in a court of equity, in-

stead of decreeing upon the title and then ordering a suit in ejectment at law. The early practice in our courts of chancery upon bills seeking to enjoin alleged nuisances was in accord with the English law, to issue a temporary injunction pending a trial at law to establish the fact of nuisance, after which the injunction might be made perpetual.[21] But in time our chancery courts came to hold that they had a right to grant the perpetual injunction at the final hearing, without a preceding trial at law, "when the legal right of the party complaining is clear and undoubted, and the wrong is not susceptible of adequate compensation in damages recoverable in an action at law, or is in its very nature and character continuous and constantly recurring."[22] And finally these powers of chancery, strengthened by the decisions in Farris v. Dudley,[23] English v. Progress Electric Light & Motor Company,[24] and other similar expressions of opinion, developed into full authority to determine finally the entire question of fact as well as of law.[25]

§ 22.——Again it must be noted that the action of the court of chancery in establishing facts in the latter class of cases above mentioned, namely, where damages are awarded in chancery for past injuries in the same action in which an injunction has been obtained, is not purely a matter of procedure, but is an extention of equity jurisdiction.

In Whaley v. Wilson,[26] Mr. Justice Haralson for the court says:—"Having assumed jurisdiction to grant relief in such a case, the court of equity will retain the bill and proceed to do complete justice to the parties without remitting them to a court of law for an adjustment of damages to which the complainant may be entitled growing out of the creation and maintenance of the nuisance. This may be done on the evidence by the chancellor himself, or by reference to the register to report, or else it may be submitted to the determination of a jury."

[21] State v. Mobile, 5 Porter 279.
[22] Nininger v. Norwood, 72 Ala. 277.
[23] 78 Ala. 124.
[24] 95 Ala. 259.
[25] Hundley v. Harrison, 123 Ala. 292.
[26] 112 Ala. 627, 631.
[27] 29 Ala. 397.

§ 23.——The earliest case cited by the learned judge to support this power is Stow v. Bozeman's Executors,[27] where Mr. Justice Walker for the court said: "The court, having obtained jurisdiction over the case on account of the misrepresentation as to the quantity of the land, should have gone on and done complete justice by settling the entire litigation, without remitting the complainant to his defense at law as to the payments alleged to have been made on the notes. Having jurisdiction for one purpose, the court acquired jurisdiction over the question of the credits on the notes, and ought to have gone on and adjudicated that matter of litigation. If the question of fact had been of damage, or fraud, or any other peculiarly fitted for the determination of a jury, it would have been proper to have left that question for trial at law; but in this case, the question being one of account, it was proper for the chancellor to have gone on and done complete justice by deciding it."

It is apparent, therefore, that the law of Whaley v. Wilson, enunciated as quoted above, is not the same thing as the universal doctrine of equity jurisdiction that when the subject matter of litigation is before a court of equity for one purpose all connected questions will be determined at the same time; for instance, the subject matter of an estate.[28]

§ 24. **Third cardinal difference (continued).**—Nor is this right of chancery to settle all matters involved in any suit dependent in any respect upon statutes. Indeed that branch of out statutes upon issues out of chancery, sections 3201 to 3205 of the Code of 1907, contemplates the old practice of ordering trials at law, and merely obviates the delay incident to awaiting the attention of the circuit court by authorizing the chancery court to summon a jury. These sections are very old, dating from 1852.

§ 25. **Fourth cardinal difference between Alabama and English systems.**—IV. Reverting now to the fourth feature which distinguishes chancery pleading in Alabama from chancery pleading as it used to be in England, it is found that in Ala-

[28] Marshall v. Marshall, 86 Ala. 685; Tygh v. Dolan, 95 Ala 269. 283; Jackson v. Rowell, 87 Ala.

bama all available defenses may be incorporated in the answer and be pleaded at once. That privilege is now a statute, section 3115 of the Code of 1907, having come down to us in its present form from the first authoritative collection of statutes, the Code of 1852. But prior to that time it was even more stringent. By the act of 1823 "to regulate proceedings in Chancery suits," Aiken's Digest 287, "no plea or special demurrer shall be filed to any bill or answer, but it shall be lawful for defendant to embrace all the matter of his plea and demurrer, either general or special, in his answer, and shall have the same benefit thereof as if the same had been pleaded." And in Crawford v. Childress,[29] the Court say, "This statute dispenses to a great extent with formality in equity pleading; neither the demurrer nor plea need be drawn out at length. It was sufficient for defendants in the case before us to have said in their answers that they insisted upon the benefit of a demurrer to the bill, and upon the statute of limitations in bar of recovery."

No prior decision is cited by the court, so we must deduce the purpose of the act of 1823 from its face and this decision in Crawford v. Childress; and from these it would seem that the framers of the act were only governed by an incautious desire to limit the scope of pleading because they recognized it to be prolix, without studying it sufficiently to identify its defects.

§ 26.——As a result of their zeal we have the absurd situation presented in Tyson v. The Decatur Land Co.,[30] where a ridiculous plea concealed in the answer was allowed the same weight after submission of the cause that it would have received if issue had been formally taken upon it; and it can hardly be said that in the light of the statute the decision was unsound. Fortunately the wording of the statute as it first appeared in 1823, was changed in the Code of 1852, so that the defendant since that time has had the right to pursue the English practice and present his defenses separately if he chooses; and as he generally finds it to his advantage to do so, the practice of incorporating a plea in an answer has been of little value but to catch the unwary plaintiff. And now that the

[29] 1 Ala. 482.

[30] 121 Ala. 414.

decision in Stein v. McGrath,[31] has made it clear that the plea if incorporated in the answer must be distinctly identified as such, practically all advantage of so pleading is dispensed with.

§ 27.——One other feature of chancery pleading in Alabama should be noted as different from English practice, although ignorance of it could not radically affect a defendant conducting his defense after the English practice. The replication has been abolished in Alabama chancery pleading.[32] But by the omission of the replication to an answer the uniformed defendant suffers no harm; for the next step by the plaintiff will be the taking of testimony, and of that the defendant must have notice. And while the dispensing with the replication to a plea, which was accomplished by the decision in Tyson v. The Decatur Land Company (supra), formerly might have caused the stranger some trouble if he failed to notice a distinct plea accompanying an answer, a new addition to section 3115 of the Code of 1907, probably removes all danger in future.

§ 28. Value of first Alabama modification.—Finally it may be well to consider the value of the four cardinal features of Alabama pleading discussed above as compared with the English practice from which they are distinguished.[33]

To discover the error in establishing the first distinguishing feature in Alabama chancery pleading, that which dispenses with making proof of averments to the court in the absence of denial by the opponent, it is only necessary to recall the almost universal unsoundness of ex parte decisions. There is no lawyer but can recall some instance of important decisions in one or the other branch of law which would probably have been decided otherwise had the other side of the question been fully presented to the court. Recall, for example, the historic decision of Lord Eldon in Ex parte Pye,[34] by which the necessity for a consideration to sustain a bargain and sale was dispensed with when the grantor declares his intention to create a trust in himself for some specified beneficiary. And

[31] 128 Ala. 175.

[32] Code of 1907, § 3122; Code of 1896, § 701.

[33] See Appendix C. for additional discussion of the subject of these changes along with recommendations for legislative action.

[34] 18 Vesey 140.

so we have today the puzzling question whether a declaration of trust can be revoked when the beneficiary has never known of its having been made.

But if ex parte conclusions upon law are fraught with danger, how much more dangerous must be ex parte conclusions upon facts! If it were possible for a defendant's rights to be entirely limited to one issue; or if it were certain that the rights of no one else were involved but those of the plaintiff and the defendant, it would probably be wise to dispense with litigation by granting to the plaintiff whatever a notified defendant does not deny him; but we all know that the rights of every person are so interlaced with the rights of others that whenever any rights are litigated, the more the proof that is required, the more the justice that is done. Hence it would be wise for the chancellor to resume his position of protector of the rights of all.

§ 29. Value of second Alabama modification.—The value of the second distinguishing feature of Alabama chancery practice, the right of the plaintiff to waive the defendant's oath, has been already discussed in attempting to establish the distinction. Even if the oath is of little value today to compel truth instead of falsehood, it is of great value in putting bounds to the pleading. And when the evil consequences of the answer as testimony are removed by the plaintiff's swearing to his bill, as our statute of 1896 referred to above allows him to do, the return to the oath would seem in all respects beneficial.

§ 30. Value of third Alabama modification.—The third distinguishing feature of Alabama chancery pleading, that allowing the court to settle all collateral questions without referring them to law, would seem undoubtedly an improvement upon the English practice. There are very few questions affecting property in which the chancellor or the register is not as capable of awarding justice as a jury; and since our statutes have given our chancellor the discretionary power to summon a jury if he believes it necessary, there is little to be gained in dividing the jurisdiction. As a general rule the chancellor's judgment whether a jury is necessary is better than that of

[35] 123 Ala. 292.

[36] 112 Ala. 627.

the parties. Let us be glad, therefore, that Hundley v. Harrison,[35] and Whaley v. Wilson, [36] discussed above, were decided as they were.

§ 31. Value of the fourth Alabama modification.—And that brings us to the fourth and last distinguishing feature of Alabama chancery pleading: is it wise to allow the defendant to incorporate all his defenses in his answer? And if the situation is analyzed, the conclusion seems unavoidable that it is not. For the plaintiff who has filed a good bill there is a gain if all the defenses are presented at once, because thereby his suit will be subjected to less delay, and to but one appeal to the Supreme Court. But even then the support of a bill in the Supreme Court against a hydra-headed demurrer, one or more pleas, and the intricacies of evidence in support of the answer, is a matter so involved that the risk of causing confusion by many arguments may outweigh the benefit of time saved. The defendant, on the other hand, may assign errors on all his points and lay stress of argument only on his best, thus making his argument single and concise. And of course to a plaintiff with an uncertain bill there is no advantage at all.

To the defendant, on the other hand, there would seem no good reason for incorporating all his defenses in his answer; and indeed if he believes his interlocutory defenses to be good, the additional labor of preparing an answer is thrown away. If he believes but is uncertain that the bill is multifarious, as that defect is waived unless raised by demurrer, time may be saved by incorporating a demurrer on that ground in his answer. But if he is correct in this belief, he is likely to have to prepare his answer again on account of the plaintiff's right to amend.

On the whole, therefore, the apparent gains conferred by the law allowing the incorporation of all defenses in the answer are of doubtful value; and the confusion caused by the statute in its bearing upon the rules of pleading is so great that it is often impossible to tell what rights have been affected by it. It would seem, therefore, that its repeal is to be desired.

§ 32. Cross-bill not a defense.—Let it be remembered, however, that the defenses referred to do not include cross-bills.

This method of defending against the effects of bills has not been held to be within the statute above discussed, and therefore could not be involved in our fourth distinction between pleading in England and pleading in Alabama. The wording of the statute is broad enough to cover cross-bills if cross-bills are properly a defense,—"a defendant may incorporate all matters of defense in his answer, and is not required to plead specially in any case." But the early lawyers evidently did not think of including cross-bills, because they enacted in the same Code in which the above section first appeared, that of 1852, another section authorizing defendants to make their answers cross-bills;[38] all of which will be discussed later when the subject of cross-bills is taken up. The fact that the sections so read precludes the necessity of discussing here whether a cross-bill should be classed as a defense. Suffice it to say that Daniell, Langdell, and Story do not class it as such, whereas Mitford (Lord Redesdale) does.[39]

§ 33. Plan of pursuing our subject.—Let us now proceed to examine the subject of chancery pleading in Alabama in detail; and let us first determine its classification. Assuming that most of us study it with the plan of conducting a cause, it is best to determine first where the action must be brought, then who may be plaintiffs, then who may be made defendants, then the necessary parties to the cause; and then to investigate the form of stating or presenting the cause, which is called in Alabama the bill.

§ 34.——The different kinds of bills will be described in Chapter VII; but while there seem to be a good many different kinds, the only ones commonly met with are bills for relief upon rights claimed by the plaintiffs in opposition to rights claimed by the defendants, bills for discovery, and statutory bills, or bills praying the assumption of jurisdiction under certain statutes authorizing chancery courts to grant relief apart from any principle of equity. The last include at present only bills for relief from the disabilities of non-age and bills to quiet title to real estate.

[37] Code of 1907, § 3115.

[38] Code of 1907, § 3118; Code of 1896, § 720.

[39] I Daniell Ch. Pr. 586; Langdell Eq. Pl. § 116; Story Eq. Pl. §436; Tyler's Mitford Eq. Pl. 179.

As bills for relief upon rights claimed by the plaintiffs in opposition to rights claimed by the defendants include far the greater number of bills, and involve the consideration of all steps in pleading, the entire course of a suit will be gone over beginning with such a bill for relief before taking up other bills for relief, bills for discovery, and statutory bills. The defenses also which apply to these latter alone are not puzzling after the defenses to bills for relief have become familiar.

CHAPTER II.

Where to Institute the Cause.

§ 35. Alabama divided into Chancery divisions and districts.—After having determined that the subject matter of the cause of action is within the jurisdiction of a court of Chancery, and that the kind of relief which that court can grant is what the plaintiff requires, the first question to decide is where the suit should be brought. The State of Alabama has been divided by the legislature in accordance with section 145 of the Constitution of 1901, as well as similar provisions in the two previous constitutions, into Chancery Divisions; and at present there are five of those divisions, the Northern, the Northeastern, the Northwestern, the Southeastern, and the Southwestern Chancery Divisions respectively, over each of which one Chancellor presides, and in which he must reside.[1] These Divisions are in turn divided into districts, each

[1] Code of 1907, § 3042, et seq. § 3058. Alabama has had six constitutions adopted in 1819, 1861, 1865, 1868, 1875, and 1901, respectively. The constitution of 1868 was the first to create separate courts of chancery. The constitution of 1819, provided that "The general assembly shall have power to establish a court or courts of chancery with original and appellate jurisdiction; and until the establishment of such court or courts, the said jurisdiction shall be vested in the judges of the circuit courts respectively," to whom jurisdiction in all matters civil and criminal was given by another section. The constitutions of 1861 and 1865 followed in substance that of 1819. The circuit courts were confirmed in an exclusive jurisdiction in chancery by Act of the general assembly of 1819. "The equity jurisdiction heretofore belonging to the superior courts of law and equity in the territorial government, is hereby vested in the circuit courts of the State." Aiken's Digest 287, paragraph 10. The procedure in chancery matters was distinct from the procedure at law, however, Aiken's Digest, 286.

The circuit courts continued to dispose of chancery business in this way until the Act of the General Assembly of 1841, Clay's Digest, 344; when the state was divided into three chancery divisions and the divisions into districts and courts of chancery provided in each district, entirely separate from the circuit court of each county. The constitution of 1819, although authorizing the creation of separate courts of chancery, required that the judge

district embracing one county, with the exception of the thirteenth district of the Southeastern Chancery Division, which embraces the counties of Mobile and Baldwin, and the possible exception of the second district of the Northwestern Chancery Division, which either embraces the two counties of Walker and Winston, or the county of Walker alone, according as the Supreme Court may construe conflicting sections in the Code of 1907.[2]

Lee County, and Winston County, if the Supreme Court holds that the second district of the Northwestern Chancery Division consists of Walker only, are in no chancery division. Section 147 of the Constitution of 1901, authorizes the legislature, if it deems it wise, to leave populous counties out of any chancery division, and Lee County was so isolated; but a special court having the jurisdiction of the chancery court has been established in its place.[3] And section 148 of the Constitution of 1901, authorizes the legislature to confer the jurisdiction of the chancery court upon the circuit court; and this has been done in Winston County.[4]

of the several circuit courts be left the power to issue writs of injunction returnable to the courts of chancery. And the later constitution, which required courts of chancery, have also retained this provision. Notwithstanding the creation of separate courts of law and of chancery respectively by the constitutions of 1868 and 1875, the legislature have repeatedly created additional courts in populous counties to which the jurisdiction of both law and equity was given, the sittings and procedure in each being separate, of course; and the legislature, in four counties, Jefferson, Madison, Walker and Winston, conferred equity jurisdiction upon the circuit court. These acts creating law and equity courts were all held constitutional; State ex rel. Winter v. Sayre, 118 Ala. 1; Ex parte Rountree, 51 Ala. 42; and the Act conferring equity jurisdiction upon the circuit court was sustained in Ensley Development Co. v. Powell, 147 Ala. 300.

The constitution of 1901, § 148 provides that "The Legislature may confer upon the circuit court or the chancery court the jurisdiction of both of said courts;" or it may combine all the courts in a county but the probate court.

[2] Code of 1907, §§ 3043, 3047. § 3042, Code of 1907, omits Winston County from the Northwestern Division, but § 3045 includes it. The conflict has not yet been construed by the Supreme Court. See Appendix B, under Walker and Winston Counties.

[3] Acts of Alabama, 1907, 242. See Appendix B.

[4] See Appendix B.

Section 146 of the Constitution of 1901, requires "that a chancery court, or a court having the jurisdiction of the chancery court shall be held in each district, at a place to be fixed by law, at least twice in each year," and the legislature has provided the place, time, and duration of holding court in each district.[5] But the legislature has also provided that "special terms of any chancery court may be held at the place of holding the regular term when any regular term is not held, or when the business is not disposed of at any regular term;" and of each special term thirty days notice must be given by advertisement in a newspaper published in the county, or if none be published there, in the newspaper published nearest to the county in which the special term is to be held.[6] The chancellor may adjourn the term of court to a future day, however, by an order on the minutes without other notice.[7]

In addition to the chancery court, the legislature has created in many counties courts having concurrent jurisdiction with the chancery court and jurisdiction at law also, although the sittings at law and in equity are entirely separate. The procedure in these courts when sitting in equity is the same as in the chancery court. These courts have been held authorized by the general wording of section 139 of the Constitution of 1901 and previous constitutions, reciting the courts in which the judicial power of the State shall vest, and including "such courts of law and equity inferior to the Supreme Court, and to consist of not more than five members, as the legislature from time to time may establish."

The various courts in the State of this nature are given in Appendix B, together with their times for holding court, which are different in each instance.

§ 36. Suit commenced by bill: where filed.—A suit in chancery in Alabama, like a suit in chancery in England is commenced by filing a bill containing the statement of the plaintiff's cause, and praying the relief which he desires.[8]

[5] Code of 1907, § 3043 et seq. For a list of the present times, places, and durations of chancery courts, see Appendix B.

[6] Code of 1907, §§ 3048, 3049.

[7] Code of 1907, § 3051.

[8] Code of 1907, § 3090; 1 Daniell Ch. Pr. 1.

This bill is filed with the register of the chancery court of some particular district, or with the register of the other court having chancery jurisdiction in the particular district or county; and this district is determined by section 3093 of the Code of 1907, which is as follows:—"The bill must be filed in the district in which the defendants or a material defendant resides; and if to enjoin proceedings on judgments in others courts, it may be filed in the district in which such proceedings are pending, or judgment rendered; and in case of non-residents, in the district where the subject of the suit, or any portion of the same is, when the cause of action arose, or the act on which the suit is founded was to be performed; or if real estate be the subject matter of the suit, whether it be the exclusive subject-matter of the suit or not, then in the district where the same, or a material portion thereof is situated."

§ 37. Chancery requires jurisdiction of defendant's person.—It has always been a principle of equity jurisdiction in England that chancery acts upon the person of the defendant, and not upon the subject matter; or to quote the Latin maxim, "Aequitas agit in personam."[9] And this principle was early declared in Alabama.[10] But it followed from that principle that although the court might have the subject matter or property in its power, no action could be brought in chancery concerning it which would affect the rights of any defendant not personally within the territorial jurisdiction of the court. Where some of the proper defendants were out of the jurisdiction and some were in it, it was English chancery practice to charge that fact in the bill, and then proceed against those in the jurisdiction without regard to those not within it.[11] But where none of the defendants was within reach, no relief against them could be had. Any mode of procedure different from that must depend therefore upon statute.

§ 38. Other chancery jurisdiction in Alabama conferred by statute.—Moreover, apart from statutory extensions, the ter-

[9] Story Eq. Pl. § 489; Penn. v. Lord Baltimore, 1 Ves. Sr. 444.

[10] Guild v. Guild, 16 Ala. 121.

[11] 1 Daniell Ch. Pr. 234; Smith v. the Hibernian Mines Co., 1 Sch. & Lef. 540.

ritorial jurisdiction of a chancery court in Alabama is the district in which the court is being held.[12] And so it will be noted that the above Alabama statute, sec. 3093, broadens the English practice very materially by putting it within the option of the plaintiff to sue the defendant in certain named cases in other districts than that in which the defendant resides. Thus where the subject matter of the suit is real estate which lies in a different district from that in which the defendant resides, the plaintiff may elect in which of the two districts he will bring his action.[13] And the same right to elect is given by the wording of the statute where the suit is to enjoin proceedings on judgments in other courts; which suit may be brought either in the district where the defendant resides, or in the district where the judgment was obtained, or in the district where the proceedings to enforce the judgment are pending; each of which, it is evident, may be in a different district. But if the suit in chancery be to enjoin a suit in another court not yet carried to judgment, it must be noted that the statute does not alter the requirement that the bill be filed in the district where a material defendant resides, without regard to the locus of the suit which it seeks to enjoin. There are no decisions upon these points, however.

§ 39. Jurisdiction over non-resident defendants. — Also where the defendant is a non-resident the right to sue him, when he is not personally served with process, is entirely statutory;[14] and the action can be brought in that district alone where the subject of the suit (usually property) is when the cause of action arises,[15] or in the district in which the act upon which the suit is founded was to be performed. But it must be noted that if the act upon which the suit against the non-resident is founded affected real estate, then the suit can be brought only in the district where the land lies,[16] ap-

[12] Johnson v. Shaw, 31 Ala. 582.

[13] Reeves v. Brown, 103 Ala. 537; Harwell v. Lehman, 72 Ala. 344. Ashurst v. Gibson, 57 Ala. 584; Tindal v. Drake, 51 Ala. 574.

[14] Sayre v. Elyton Land Co., 73 Ala. 85, 98.

[15] Sec. 3093 Code of 1907.

[16] Reeves v. Brown, 103 Ala. 537, distinguishing Bolling v. Munchus, 65 Ala. 558.

parently without regard to whether the act was to be performed where the land lies, or at some other place. Thus if A, a non-resident of Alabama, contracted with B in writing to meet him in Montgomery County and there to convey to B a house and lot situated in Birmingham in Jefferson County, but failed to carry out his contract; if B desired to sue A for specific performance of this contract and could not get personal service upon him, he could sue A in Jefferson County only.[17]

§ 40. Personal judgment without jurisdiction of the person invalid.—It is apparent that a statute which should attempt to authorize a court to proceed against a non-resident without personal service upon him, and in such proceeding to give a personal judgment against him to be collected out of any of his property wherever situated, would be unsound. A judgment under it could not be enforced beyond this state, except through the aid of other than Alabama courts; and courts of other states would regard it an illigitimate assumption by Alabama of jurisdiction and authority over persons and property without her territory.[18] Nor could it be enforced against any property of the non-resident within this state, because to do so would be unconstitutional. It would offend the fourteenth amendment of the federal constitution, and section 6 of our own constitution, in not being due process of law; that is to say, it would be contrary to the history of our procedure and to natural justice. And it is immaterial that the property may be within the physical power of the court.[19]

§ 41. Proceedings in rem.—But though it is not due process of law to render a judgment against a non-resident without service of process upon him, and then to satisfy the judgment out of any of his goods within the reach of the court, it has always been due process of law to seize any goods of the defendant within reach of the court and then to prove to the court in a suit to that end that the defendant owes the

[17] Bolling v. Munchus, 65 Ala. 558.

[18] Pennoyer v. Neff, 95 U. S. 714, 722.

[19] Exchange Bank v. Clement, 109 Ala. 270; Eslava v. Lepretre, 21 Ala. 505.

claimant a debt; after which the seized goods may be sold by order of court and the proceeds applied to the payment of the debt. By this process the debt does not become a judgment to a greater extent than the proceeds of the seized property; but to that extent the judgment is good. This proceeding is called an action *in rem*, that is, against the thing rather than against the person; and it is justified upon the notion that a state has the right to determine the ownership of any property within its jurisdiction.[20] It does not follow from this reasoning that a state can first seize the property, then determine the fact and amount of the debt owed by the non-resident, then sell the property and apply it to the debt, and leave the non-resident to sue on an idemnity bond given for the attachment; but by some reasoning long since lost that proceeding has come to be regarded as due process of law too, and is justified as a proceeding in the nature of a proceeding *in rem*.[21]

§ 42. Does jurisdiction in rem exist only by statute.—The important point to be noted here is that the statute above quoted, section 3093 of the Code of 1907, must be taken as extending chancery jurisdiction, which we have seen is primarily a proceeding *in personam*, by giving it under certain circumstances jurisdiction *in rem*. Of course this is clear enough where defined by statute; but the question will be presented to us later whether chancery procedure in Alabama can be a proceeding *in rem* in instances not expressly provided by statute. This question is forcibly presented in the administration of estates in chancery, and in suits for partition and suits for sale for division of property, which will be discussed later.

§ 43. When the non-resident is in Alabama and the property is not.—The proposition being established therefore that even though the subject matter of a suit in chancery be within the territorial jurisdiction of the court, a defendant cannot be sued and subjected to a personal judgment, or be required to do equity, if he is not within the jurisdiction in person; the converse proposition is also true, that even though the sub-

[20] Arndt v. Griggs, 134 U. S. 316; Pennoyer v. Neff, 95 U. S. 714.

[21] Exchange Bank v. Clement, 109 Ala. 270, qualifying Eberlin v. Betancourt, 71 Ala. 461.

ject matter of a suit lie entirely beyond the territorial jurisdiction of the court, if the defendant is within it he may be sued and subjected to a personal judgment, and be made to do equity so as to affect the distant property. This was recognized in England in the leading case of Penn v. Lord Baltimore,[22] where Lord Hardwicke, probably the greatest judge of equity who ever sat in England, entertained at the suit of a governor of a province in America a bill for specific performance of articles respecting the boundaries of the two provinces of Maryland and Pennsylvania. And if the judgment is a decree that the defendant pay money, it will be recognized in courts beyond the state of Alabama, in the courts of sister states, because the federal constitution so requires.[23] And if the judgment is a decree that the defendant convey property, it is plain that he can be imprisoned until he consents to do so in compliance with the laws regulating conveyancing in force where the land lies. As said by the late Chief Justice McClellan,[24] "So long as the relief sought may be worked out directly on the person of the defendant and indirectly through his person on property in a foreign jurisdiction, it is immaterial what form the decree assumes, whether it is affirmative or negative in its effect, whether it commands an act to be done, as for instance the execution of a conveyance, or restrains the doing of an act, as for instance, the alienation of property, the institution or prosecution of suits in other states, and the like."

It may be suggested, however, that an injunction against acts in another state, is more difficult to enforce; for when the defendant once gets out of the State of Alabama, he can do what he will, being beyond the reach of the machinery of Alabama courts to stop him.

§ 44. Right to sue non-residents broader than right to sue residents.—Finally it must be noted that the right to sue a non-resident in Alabama is broader than the right to sue

[22] 1 Vesey Sr. 444.

[23] Christmas v. Russell, 5 Wall. 290. Beyond the U. S. it should be recognized from comity; but as the decisions are confused, the enquirer is referred to some work on conflict of laws.

[24] Allen v. Buchanan, 97 Ala. 399, 402.

a resident; for a non-resident may be sued and be subjected to a personal judgment in any district in the State where he may be caught and served with process,[25] but a resident can be sued only in the districts specified in the statute above quoted.[26]

§ 45. Defenses when suit is brought in the wrong district.—Therefore if a bill against a resident defendant shows that he resides in a different district from that in which the bill is filed, and the case is not one in which a choice of the district sued in is authorized by the statute, the defendant may move to dismiss the bill for being brought in the wrong district,[27] or he may file to the bill a general demurrer.[28] But if the error of jurisdiction does not appear upon the face of the bill, a plea, which Chief Justice Brickell called a plea in the nature of a plea in abatement, is an appropriate mode of presenting the objection.[29]

The defendant may waive the error of jurisdiction, however, and his failure to insist upon it before answer will be taken as such a waiver.[30] And of course he cannot raise the

[25] Pearce v. Jennings, 94 Ala. 524.

[26] Sec. 3093, Code of 1907. See § 36 supra. The reason for thus restricting the plaintiff to suing in the district of the defendant's residence, is given by Brickell, C. J., in Harwell v. Lehman Durr & Co. 72 Ala. 346, as follows: "The purpose of the statute in limiting suits in equity to the residence of a material defendant as has been heretofore explained, like that of the statute limiting personal actions at law to the county of the permanent residence of a freeholder or householder, is, that parties may not be drawn into litigation in localities distant from their residence." It is surprising, however, that our laws consider the convenience of the defendant so much more than that of the plaintiff; for since service of summons in Alabama is not complete by leaving a copy at the defendant's residence, but must be served by the sheriff upon the defendant personally, Code of 1907, § 3098, Code of 1896, § 682, the defendant may interminably delay a cause by merely withdrawing into an adjoining district.

[27] Shrader v. Walker, 8 Ala. 244; Porter v. Worthington, 14 Ala. 584.

[28] Lewis v. Elrod, 38 Ala. 17. General demurrers have been re-established in Alabama. Code of 1907, § 3121.

[29] Campbell v. Crawford, 63 Ala. 392; Harwell v. Lehman Durr & Co., 72 Ala. 344.

[30] Freeman v. McBroom, 11 Ala. 943.

point for the first time in the Supreme Court on appeal.[31] Nor should the court dismiss the bill for this defect of its own motion.[32] Indeed the parties may by agreement transfer a cause to any jurisdiction which suits their convenience.[33] And when that jurisdiction has become fixed, it is fixed for all purposes, just as if the cause had not been transferred; and new parties may be brought in by amendment who cannot object to the jurisdiction to which they are thus called.[34]

Let us now discuss the proper parties to a chancery suit.

[31] Branch Bank of Mobile v. Rutledge, 13 Ala. 196.

[32] Branch Bank of Mobile v. Rutledge, 13 Ala. 196.

[33] Gay Hardie & Co. v. Brierfield C. & I. Co., 94 Ala. 303, same case, 106 Ala. 615.

[34] Gay Hardie & Co. v. Brierfield C. & I. Co., 106 Ala. 615.

CHAPTER III.

Of the Parties to a Suit.

Who Are Capable of Being Parties.

§ 46. Subject of parties separates into two divisions.—It is apparent that the study of the subject of parties to suits in chancery separates primarily into two main divisions, the first involving the question who are capable of being parties to a suit in chancery, and the second involving the question who ought to be parties to a suit in chancery in order to bring it properly before the court for adjudication.

§ 47. First main division sub-divided.—The first of these main divisions separates at once again into two sub-divisions; one involving the question who are capable of instituting a suit in chancery as plaintiffs, and the method of their appearance, and the other involving the question who are capable of being subjected to a suit in chancery as defendants, and the method by which they are made to appear.

§ 48. Second main division sub-divided.—The second main division, involving the question who should be made parties to a suit in order to bring it properly before the court for adjudication, will require first a determination of the somewhat confused question who are proper parties to a suit in chancery and who are necessary parties to a suit in chancery, and will then separate into the sub-questions who are necessary parties plaintiff, who are necessary parties defendant, when and how objection should be made on account of the absence of parties plaintiff or defendant, and lastly when and how objection should be made when improper parties have been introduced into the suit.

Each of these divisions of the subject of parties, and the questions and sub-questions thus involved in them, will be elaborated in proportion to the extent that Alabama decisions have touched upon the subject matter.

§ 49. Those qualified and those dis-qualified to be parties considered together.—First, then, to consider the question who are capable of being parties to suits in chancery. And

as the number of persons disqualified from suing or being sued, whether absolutely disqualified or disqualified from being parties alone, is much less in Alabama than it was in England, it would seem that the persons who may not sue or be sued may be discussed at the same time as the persons who may sue and be sued without too greatly enlarging the two sub-divisions into which they would thus fall.

PART I.

Of the Persons by Whom a Suit May be Instituted in Chancery.

§ 50. Any person may sue.—It would appear that no person of sound mind and over twenty-one years old is debarred from bringing a suit in chancery in Alabama, whether he be citizen, foreigner resident in Alabama, or alien; so that most of the classes into which would-be plaintiffs in England are divided do not exist with us. Section 10 of the constitution of 1901, in repetition of section 11 of the preceding constitution, provides "that no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." And section 13 is to the same effect, that "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law." These two sections dispense with all limitations which could be based on conviction of felony or other personal disqualification. And taken with section 2 of Article IV of the federal constitution that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," insures the full right to sue in chancery in Alabama to citizens of the other states of the United States.

§ 51. The right of foreigners to sue.—While it may be doubted whether the above sections from the Alabama constitution, however broad their wording, would be a warrant to foreign residents and aliens to sue,[1] section 34 of the present Alabama constitution, repeated from the prior constitution, provides that "foreigners who are or may hereafter become

[1] But see Sidgreaves v. Myatt, 22 Ala. 617, that a statute authorizing any person to sue included foreign residents.

bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens;" and this undoubtedly involves the grant of such rights to foreign residents. And section 2831 of the Code of 1907, provides that "an alien, resident or non-resident, may take and hold property real and personal in this state, either by purchase, descent or devise, and may dispose of and transmit the same by sale, descent or devise as a native citizen;" and our Supreme Court early held in an elaborate opinion that a federal statute similar to the above, in that it granted to certain aliens the right to hold certain lands in Alabama, also impliedly gave them the right to sue for the recovery of their lands in our courts.[2] Moreover the Alabama statute, section 2831 of the Code, giving aliens these rights, has been held since to be within the power of the legislature, and section 34 of the constitution giving foreign residents full rights, has been held not to deny such rights to aliens not residents.[3] So the right of any foreigner to sue in chancery in Alabama is beyond doubt.

§ 52. Non-residents may be required to secure costs.—It must be noted, however, that the right to sue, while granted to non-residents of Alabama, is granted upon different terms from those allowed to residents. There is no law requiring of a resident, whether pauper or not, security for costs. Nor is there any requirement of an oath as to the poverty of the plaintiff. So in connection with section 3693 of the Code that no fee must be demanded or received, except in cases prescribed by law, it must be taken to be positive law that a resident plaintiff cannot be required to secure the costs of his suit. But as to non-residents, the Code provides that "all suits at law or in equity, commenced by or for the use of a non-resident of this state, must be dismissed on motion, if security for costs, approved by the clerk or register, be not given by such non-resident when the suit is commenced, or within such time thereafter as the court may direct."[4] While the distinction made by this law does not rest upon the citizenship, but upon the residence of the plaintiff, it is apparent

[2] Jinkins v. Noel, 3 Stewart 60.
[3] Nicrosi v. Phillipi, 91 Ala. 299.
[4] Sec. 3687, Code of 1907, § 1347, Code of 1896.

that there could not be a citizen who might not claim also to be a resident of Alabama; so that the law really denies to citizens of other states one of the privileges of citizens of Alabama, and seems therefore to be offensive to section 2 of Article IV of the federal constitution above quoted. The point has never been raised by our Supreme Court, however.[5]

§ 53. When and at whose instance security is required.— This statute, section 3687 of the Code of 1907, would seem to be intended to secure the register of the court as well as the defendant, for it provides for security for all the costs, whereas, if the defendant wins the suit and the plaintiff does not pay the costs, the defendant is not liable for any costs but those created by him in his defense, and these only as a contract debt.[6] But there is no law or decision authorizing the register to move the court to require the non-resident plaintiff to secure the costs; so that his doing so depends upon the wishes of the defendant. It was held in reference to law cases in a case in 120 Alabama that the defendant may make the motion authorized by the statute at any time before entering on the trial. But it also held in a case in 110 Alabama[7] that after filing pleas and taking depositions, the motion comes too late. The case in 110 Alabama did not discuss the question, and as it antedates the case in 120 Alabama would be overruled by it but for the fact that it is cited in the case in 120 Alabama as an authority for that later decision. So it would be unsafe to postpone the motion in a chancery court later than the hearing on a demurrer.

[5] Similar statutes in other states have been held constitutional but apparently not against this objection. Compare Cyclopedia of Law and Procedure, Vol. II, 176. Of course these statutes would probably be sustained even against the objection on the ground of their being so general; but if the defect were met by requiring residents also to secure costs, the cost fees could be materially reduced, since now so many are impossible to collect.

[6] Northern v. Hanners, 121 Ala. 587.

[7] The two cases referred to are First National Bank of Anniston v. Cheney, 120 Ala. 117, and Brown v. Bamberger, Bloom & Co. 110 Ala. 342. The statute referred to requiring non-residents to secure costs was enacted in 1885. See Acts of Ala. 1884-5, 137.

§ 54. When motion made (continued).—The defendant would probably be justified in waiting to have the security approved, or money deposited in court,[8] until he could ascertain whether it would be necessary to go to the expense of taking testimony. But whenever the motion is made, the security furnished by the plaintiff must be for the whole costs, and not merely that which may be incurred after the making of the motion.[9] And it must also be noted that if any one of the plaintiffs is a resident, the motion will not be granted, even though several co-plaintiffs be non-residents.[10]

§ 55. Plaintiff's sanity presumed: how the question is raised.—It has already been stated that no person of sound mind and over twenty-one years old is debarred from bringing a suit in chancery in Alabama. Let us now examine upon what terms persons of unsound mind and persons under twenty-one years old may sue.

First as to persons of unsound mind, or lunatics. "Reason being the common gift to man, raises the general presumption, that every man is in a state of sanity, and that insanity ought to be proved."[11] But if a defendant is summoned to answer the suit of a plaintiff whom he believes to be a lunatic, the question as to the competency of the plaintiff to maintain the suit should be raised by a plea, which would partake of the nature of a plea in abatement at law.[12] It would seem to be difficult to raise the question after the merits of the cause have been entered upon; and yet if the discovery of the lunacy of the plaintiff be made at any time, the defendant should be able to raise that objection to the continuance of the suit, since a lunatic, whether he had been adjudicated insane or not. probably could not be liable for the costs if he lost his suit.[13]

[8] Under § 3688 of the Code of 1907 the plaintiff may deposit a sum of money to be approved by the clerk or register, instead of providing security for costs. But the court may order the deposit increased.

[9] Ex parte L. & N. R. R. Co. 124 Ala. 542.

[10] Ex parte Jemison, 31 Ala. 392; Eudora Mining Co. v. Barclay, 122 Ala. 506.

[11] Per Peck, C. J., in Cotton et al. v. Ulmer, 45 Ala. 378, 397, quoting Shelford, Lunatics, § 37.

[12] 1 Daniell Ch. Pr. 108 and note.

[13] 1 Daniell Ch. Pr. 108. The deed or contract of a person non compos is absolutely void,

In England the defendant could move to take the bill off the file if the plaintiff was imbecile at the time the suit was instituted; but if the imbecility developed after the suit was properly brought, the suit would be allowed to stand.[14]

§ 56. When insanity appears on face of bill.—If the fact of the plaintiff's lunacy appears upon the face of his bill, his right to sue in his own name should be raised by demurrer.[15] For any objection to the form of the plaintiff's suit which the defendant knew of from the first, would probably come too late after the merits of the cause have been gone into. It has been so held in a suit at law;[16] and the only reason for uncertainty in chancery is that the defendant may raise objection for want of parties even at the hearing;[17] and since it is provided by statute that a person of unsound mind should sue by others,[18] the Supreme Court may hold that a suit brought wrongly by a person of unsound mind can be attacked by a motion or objection at any period of the cause.

§ 57. Issue may be determined without jury.—When the lunacy of the plaintiff does not appear on the face of the bill, and is raised by plea, it would seem that the chancellor has power to determine the matter without directing an issue to a jury.[19]

§ 58. Insane person sues by next friend or guardian.—Where a person is known to be of unsound mind, whether he has a guardian or not, if it becomes necessary for him to sue in chancery, he should be a party in his own name, but he should be joined by a next friend, or by his guardian, through whom he is said to sue. The statute, section 3088 of the Code of 1907, provides that he may sue by his next friend, and that when his guardian has been duly appointed, his guardian may

Dougherty v. Powe, 127 Ala. 577; Thompson v. New England Mortgage Sec. Co. 110 Ala. 400. Hence an action brought by him and lost would seem to be no liability against his estate, whether he had been adjudged insane at the time or not.

[14] 1 Daniell Ch. Pr. 109.

[15] West v. West, 90 Ala. 458; 1 Daniell Ch. Pr. 107.

[16] Worthington v. Mencer, 96 Ala. 310, 315.

[17] See §§ 167, 168, post.

[18] Code of 1907, § 3088; Code of 1896, § 672.

[19] Kennedy v. Kennedy, 2 Ala. 625; Alexander v. Alexander, 5 Ala. 517; Atwood v. Smith, 11 Ala. 894.

be substituted for the next friend. But the Supreme Court in West v. West,[20] held that he must sue in his own name by his next friend or guardian, and that section 2479 of the Code of 1907, does not authorize a suit to be brought in chancery by a guardian alone for the use of the insane ward. It is perhaps needless to suggest that where the insane person has a guardian in the district in which suit is brought, the better practice would be for the guardian to join in the action, rather than a next friend, if the guardian is willing to do so; but it probably would not be ground for the defendant to object if the suit were brought by the lunatic and his next friend, without any excuse for the guardian's non action, since the statute seems to authorize either, and a next friend may always be held responsible to the defendant for costs of court.[21]

§ 59. Where there is no guardian, or his interest is adverse.—Where the suit is to be instituted for the lunatic before a guardian has been appointed for him, or where the interest of the guardian may clash with that of his ward, the practice in England was to bring the suit as an information on behalf of the lunatic by the Attorney General as an officer of the Crown, joining the lunatic as a party.[22] But in Alabama in the light of section 3088 of the Code, it is probable that the only proper way would be for the interested friend or relative to start the suit with the lunatic, proclaiming himself as a next friend. And in Alabama it would probably not be necessary to obtain an order of court allowing the suit to be brought.[23]

§ 60. Where insane plaintiff regains sanity pending suit.—Finally in all cases where a suit has been brought for the benefit of a lunatic or person of unsound mind, if the lunatic regain his reason pending the suit, the suit may continue in the lunatic's name alone.[24] This is easily done in chancery in Alabama; for we have seen that in Alabama the lunatic for whom the suit is brought must always be made a party himself; and so if he regains his sanity, he is already a party upon the record. The distinction made in England between luna-

[20] 90 Ala. 458.

[21] Hughes v. Hughes, 44 Ala. 698; Gray v. Gray, 15 Ala. 779.

[22] 1 Daniell Ch. Pr. 8.

[23] Bethea v. McCall, 3 Ala. 449.

[24] Sec. 3088, Code of 1907.

tics as persons who may regain their reason, and idiots as persons who cannot regain their reason, and who will therefore never have a chance to repudiate acts done for them, rendering it unnecessary that they be parties on the record of suits in their behalf, has never been observed in Alabama.[25]

§ 61. Infants as plaintiffs.—Now as to infants. Except when presenting the statutory petition to be relieved of the disabilities of non-age, in Alabama an infant must sue in all cases in chancery by a next friend, or by the guardian of his estate. The general statute, section 2476 of the Code of 1907, provides that he must sue by his next friend; but this evidently was construed later by the legislature to mean to apply to cases where he had no guardian; for section 2478,[26] not so old a section as section 2476, provides that on appointment of a guardian pending suit, such guardian may on application be substituted for the next friend, and the suit must thereafter proceed in the name of the guardian for the use of the ward. This must not be construed to mean, however, that the guardian may thereafter *sue alone* for the use of the ward, as guardians already appointed before suit seem authorized to do so by section 2479;[27] for section 2479 has been held inapplicable to suits in chancery.[28] Indeed it may be doubted whether even the general statute, section 2476, has any application to chancery courts. In Cook v. Adams,[29] in 1855, the court referred to this same statute, then section 2132 of the Code of 1852, on an appeal from a circuit court, saying, "This section has reference to the mode of prosecuting suits in common law courts of original jurisdiction, and not to appeals. We must therefore look to the common law for the rule." The court then held that an appeal was the same as a new suit, although outside that statute, and that as an infant cannot appoint an attorney, he may sue out his appeal either by his guardian or by a next friend. The infant was defendant in the lower court.

[25] In re Carmichael, 36 Ala. 514. For the purpose of having a guardian appointed in the probate court, the term, "person of unsound mind," includes idiots, lunatics, or the insane. Code of 1907, § 4361.

[26] Code of 1896, § 19.

[27] Code of 1896, § 20.

[28] West v. West, 90 Ala. 458.

[29] 27 Ala. 294.

§ 62. Infants as plaintiffs (continued).—If the statute does not apply to appeals, then, it hardly applies to chancery; but there is no decision on that point. An earlier case, Hook v. Smith,[30] held that prior to the Alabama statute on the subject[31] an infant might sue either by guardian or prochein ami. So that if the statute now section 2476 of the Code of 1907[32] does not apply to chancery, it is certain that the infant may sue either by guardian or next friend; and if the statute does apply to chancery, then by implication section 2478,[33] which is later, modifies it so as to let a subsequently appointed guardian be substituted; and if a guardian could be substituted, he can certainly join in the suit with his ward at the start. But it is positively decided that the guardian cannot sue alone.[34]

§ 63. Infants cannot sue alone.—It is contemplated by our law that the minor is perfectly safe in the hands of the court; so that but for the necessity of having some responsible plaintiff in the suit (and that necessity could arise only from a policy to secure costs), there is no reason why a minor should not always sue alone. "If a bill be filed relative to an infant's estate or person, the court acquires jurisdiction; and the infant, whether plaintiff or defendant, and even during the life of its father, or of a testamentary guardian, immediately becomes a ward of the court."[35] But be that principle sound or not, there is only one case in Alabama where a minor can sue alone in chancery, and that is under the express statutory provision allowing a minor over eighteen years of age, who has no father, mother, or guardian, to petition the chancery court to be relieved of the disabilities of non-age.[36]

§ 64. Next friend, or guardian admitted to sue without order of court.—No order of court is necessary admitting a guardian or next friend to file the suit in behalf of the infant.[37] But the court may revoke the authority of the next friend to sue,

[30] 18 Ala. 338.
[31] Clay's Digest, 336 § 130.
[32] Code of 1896, § 17.
[33] Code of 1896, § 19.
[34] West v. West, 90 Ala. 458.
[35] Per Saffold, J., in Rivers v. Durr, 46 Ala. 418, citing Eyre v. Countess of Shaftsbury, Leading Cases in Equity, V. 2, pt. 2, 139.
[36] Code of 1907, § 4505; Code of 1896, § 829.
[37] The leading case is Hooks v. Smith, 18 Ala. 338.

and substitute another person to act as next friend, if another next friend, a near relative, or the general guardian of the infant should show to the court, upon an inquiry instituted upon their application, that the suit was in fact not to the interest of the infant, or that the person suing as next friend was an improper person to sue for him.[38] But until the court so removes the next friend, his authority is presumed, and the fact that the infant has not requested him to act for him is not ground to attack the decree or to move to dismiss the bill.[39]

§ 65. Powers of next friend.—This condition of the law is not as extraordinary as it appears, however; for if the infant had expressly authorized the next friend to sue for him, being but the decision of an infant, he could himself revoke it. And beyond the assumption of authority to sue, which without some warrant is practically unknown, there is nothing that a next friend can do to harm the infant which the solicitor who manages the cause might not do under the cloak of authority. "The duties of a prochein ami, and his power are comprised within a very narrow compass. He may prosecute a right for an infant, but he can do nothing which can operate to its injury. He can, it is true, dismiss a suit, because he is himself liable for the costs, though even this may well be questioned, when injury to the minor would be the result. A prochein ami is one admitted by the court to prosecute for the infant, because otherwise he might be prejudiced by the refusal or neglect of his guardian. 10 Petersdorff, 579, note. He is in fact, but a species of attorney who is permitted to act for the infant, so far as to conduct his suit, but he has certainly not a more extensive authority than an attorney-at-law, who cannot enter into a bond or compromise the right of his client. Holker v. Parker, 7 Cranch, 496. Indeed his authority does not extend so far, for he is not authorized to receive the amount which may be recovered by the infant, but the same should be paid over to a lawful guardian alone, as it might otherwise be squandered and the infant receive no benefit. The trust of prochein ami was first created by statute, (10 Petersdorff, 579) though by long practice it may now be considered as one

[38] Barwick v. Rackley, 45 Ala. 215.

[39] Barwick v. Rackley, 45 Ala. 215.

of the rights of an infant, and was intended to provide alone for those cases where the lawful guardian omitted to protect the rights and interests of his ward, or was unable or unwilling to commence a suit in his behalf. The origin of the trust goes far to show the limited authority coupled with it."[40] That a next friend is liable for costs of suit has been twice affirmed since the above opinion.[41]

§ 66. Infant should sue by his guardian if he has one.—Therefore since we have seen that an infant can sue in chancery with his guardian, if he has one, as well as with his next friend, we must conclude that it is the better practice to do so, and to leave the use of a next friend to those cases which were the ground for his invention, namely, where the guardian is unable or unwilling to bring the suit, or where he is acting in another state and will have no property under his care in Alabama unless the suit is successful. As a general rule officers without important function or interest are undesirable agents.

§ 67. How objection for plaintiff's infancy should be raised.—If a person bring a suit in his own name, showing on the face of the bill that he is an infant, the defendant should demur, as he would if the plaintiff showed he were insane.[42] And if the fact of the plaintiff's infancy were not apparent in the bill, but were suspected by the defendant, the defendant should set it up by plea;[43] for after the suit has proceeded to its merits the objection would come too late.[44] If the defendant learned of the plaintiff's infancy too late to raise it by his plea, his only remedy would probably be to move to strike the bill from the files. But in every instance where the bill is erroneously filed by an infant alone, whether the defect be raised by demurrer, plea, or motion, the plaintiff will be allowed to amend by adding his guardian or his next friend as a party, and the cause may proceed as before.[45]

[40] Per Goldthwaite, J., in Isaacs v. Boyd, 5 P. 388.

[41] Gray v. Gray, 15 Ala. 779; Hughes v. Hughes, 44 Ala. 698. And see Thomason v. Gray, 84 Ala. 559.

[42] See § 56, supra and notes.

[43] Howland v. Wallace, 81 Ala. 238.

[44] Worthington v. Mencer, 96 Ala. 310.

[45] Howland v. Wallace, 81 Ala. 238; Savage v. Smith, 132 Ala. 64.

§ 68. Informations for charities.—Before concluding the subject of possible parties plaintiff, some attention must be given to those classes of cases in which action may be brought in chancery by the Attorney General; the one class where the State is the really interested party, and the other class where individuals are the really interested parties, but they sue as relators of their injuries to the Attorney General.

In England where the rights of the crown or of those who partook of its prerogative were the subject matter of suits in chancery, the name of the King was not used as the plaintiff as in law courts, but the matter of complaint was offered to the court by way of information through the Attorney General.[46] And there seems to be nothing to prevent such practice being followed in Alabama today. So while it is no longer the practice for suits to be brought where the State treasury or the State as an administrative entity is directly interested in the suit, it is probably the only way to sue where the State is interested only as parent of the public, as for instance to enforce public charities, and to secure gifts by individuals given with sufficient definiteness for a court of chancery to enforce them, but not given to any chartered charitable enterprise.

§ 69. Suits by the State of Alabama.—The Code of 1852 and all subsequent codes have contained a provision that "The State may sue in its own name, and is entitled to all remedies provided for the enforcement of rights between individuals, without giving bond as security, or causing affidavit to be made, though the same may be required if the action were between private citizens."[47] So wherever the object of a suit in chancery is to recover property or money for the State, the bill may be filed simply in the name of the State of Alabama.[48] And the statute above quoted con-

[46] 1 Daniell Ch. Pr. 5.

[47] Code of 1907, § 2440; Code of 1896, § 12.

[48] Vincent v. State, 74 Ala. 274; State v. Vincent, 78 Ala. 233. Section 3087, Code of 1907, which is brought forward from the Code of 1867, based upon an Act approved February 17, 1854, provides expressly that the State may sue in chancery and that the suit is governed by the same rules as suits between individuals. It may be noted, however, that this act, Acts of 1853-54, 70, was an amendment of the same § in

templates that the executive may employ special solicitors to bring suit, for it is enacted that "the written direction of the Governor of the State to the attorney of record is a sufficient authority to bring the suit."

§ 70. Suits by State for use of a beneficiary.—So where the State is not directly the beneficiary of the suit, but sues to recover property for the benefit of townships or schools existing as real or quasi corporations to whom certain land endowments have been transferred by the act of the general assembly, the practice has been to sue in chancery in the name of the State to the use of the particular township or corporation.[49] Most of the statutes creating such corporations provide trustees, however, and authorize the trustees to sue in the corporate name of the institution; so that it is no longer customary to sue in the name of the State.

§ 71. Suits by State for the use of a county.—Suit may be brought in the name of the State, too, for the use of a county where the county treasury is interested although the right of action sued on be in the name of the State alone.[50] But in these cases action might be brought just as well in the name of the county as the "person aggrieved" in contemplation of section 2473 of the Code of 1907.[51]

§ 72. General statute not always applicable.—There are certain peculiar advantages enjoyed by the State as incident to its sovereignty, such as its immunity from suit, even by cross bill, as we shall see in the next Part of this chapter; but the State is not without some disadvantage attached to its position. It is an accepted doctrine that general stat-

the Code of 1852, § 2137, from which § 2440 of the Code of 1907 has come down; so that it was probably surplusage to give the State express authority to sue in chancery by § 3087. There seems to be no decision referring to § 3087. It provides, however, what § 2440 does not provide with reference to suits by the State, that if the State is unsuccessful in its suit in chancery it is liable for the costs as individual suitors are.

[49] The State to the use of, etc. v. Rice, 65 Ala. 83.

[50] The State to the use of Sumter County v. Bradshaw's Admx., 60 Ala. 239.

[51] Code of 1896, § 14; Lewis v. Lee County, 66 Ala. 480; Dudley v. Chilton County, 66 Ala. 593.

utes do not apply to the State;[52] so that there is always uncertainty whether the State can take advantage of its right to be plaintiff without being liable to defenses that have been abolished against individuals. For example, there being no provision for the State to swear to its bill, unless the solicitor who draws the bill may be willing to swear to it, the defendant's answer under oath would be taken to be true unless the State produced two witnesses or one witness and corroberating circumstances against him.[53] Again it may well be doubted whether the State can have execution against non-residents on a decree upon its bill taken pro confesso without personal service, until one year has expired. And doubtless other confusing questions would arise in suits by the State.

§ 73. Informations where many are interested.—The other class of cases brought by the Attorney General in England cover those cases in which individuals are chiefly interested; but as their interest is in common with an entire community or locality, their remedy was an information by the Attorney General upon their relation of the ground of complaint. The form of the suit was the Attorney General ex rel. the real plaintiff, against the defendant. And as Daniell says,[54] this person, the relator, "in reality sustains and directs the suit and he is considered as answerable to the court and the parties for the propriety of the proceedings, and the conduct of them. But he cannot take any step in the cause in his own name and independent of the Attorney General."

§ 74. Informations where many are interested (continued).—In Alabama this form of bringing suit is followed where the cause of action is a public transaction about which the plaintiff as a member of the public has a right to complain. Such a case was a suit on the relation of a named plaintiff and others, as citizens, tax-payers, and owners of real estate in the city of Montgomery, against the corporate authorities of that city, seeking to enjoin the collection of a special tax upon all the real estate in the city assessed to pay the

[52] Ex parte McDonald, 76 Ala. 603.

[53] Code of 1907, § 3117; Code of 1896, § 680.

[54] 1 Daniell Ch. Pr. 12.

interest upon certain city bonds.[55] And while the suit was lost on its merits, the form of action was recognized, and the relators were taxed with the costs.

§ 75. Information for public nuisances.—In England this form of action was also followed by individuals who sought to enjoin public nuisances of which they had a right to complain, but from which they had not individually sustained the damage necessary for them to sue in their own names alone.[56] And this is the practice in Alabama also. The Attorney General "might well have proceeded upon his own authority, without the intervention of any other person as relator. The only necessity for a relator being connected with the proceedings * * * is that there may be a party responsible for the costs and the conduct of the case."[57] On the other hand, if it were clear that the plaintiff suffered irreparable injury from the nuisance in a special degree apart from the public generally, he could always sue in his own name, without the intervention of the Attorney General,[58] and can do so now. But if the plaintiff sues as relator to the State, he

[55] The State ex rel. Stow v. City Council of Montgomery, 74 Ala. 226. The heading of the cause in the report is misleading, however; for the statement of the cause shows that the bill was filed by the Attorney General in the name of the State on the relation of J. P. Stow and others.

[56] 1 Daniell Ch. Pr. 9; 3 Daniell Ch. Pr. 1858. Attorney General ex rel. v. Nichol, 16 Vesey 338; Attorney General v. Forbes, 2 Mylne and Craig, 123.

Where a nuisance is a public nuisance and the plaintiff files his bill for injunction in his own name alone, and not as relator, he would fail. Baines v. Baker Ambler 158. 3 Atkyns 750. In that case the chancellor, Lord Hardwicke, said that the house the building of which it was sought to enjoin, if a nuisance at all, was a public nuisance; and if it was a public nuisance it would be for the consideration of the Attorney General, whether he would file an information to enjoin it.

[57] Per Goldthwaite, J., in the State ex rel. v. The Mayor and Aldermen of Mobile, 24 Ala. 701. And see Hoole v. The Attorney General ex rel. 22 Ala. 190. This practice has just been reaffirmed in Deer v. State ex rel. Tuthill, 46 So. Rep. 848, May, 1908. In Alabama the form of the case is The State ex rel., however, instead of the Attorney General ex rel.

[58] 3 Daniell Ch. Pr. 1858; Corning v. Lowerre, 6 Johns. Ch. 439; Mayor of Columbus v. Rogers, 10 Ala. 36; Whaley v. Wilson, 112

must make it clear that he is suing on behalf of himself and the rest of the public; for if he emphasizes his private interest, he will fall under the influence of the decisions limiting his right to sue as a private person.[59]

§ 76. Corporations as plaintiffs.—It has not been thought wise to consider the right of corporations, either municipal or private, to sue in chancery. Both these creatures of the legislature, if Alabama corporations, are usually given express authority to sue, either by general law, or by their charters; and the many questions to be considered in connection with the right of foreign corporations to sue, make it desirable that the whole subject of foreign corporations be studied before a suit be attempted in their names. If the foreign corporation has not been doing business in this State prior to the suit, the subject will not present any difficulty; but if it has been transacting business in Alabama in any form, its entire rights in court may be affected by some oversight to comply with the laws affecting foreign corporations. To go into that subject would be improper in this work.

§ 77. Foreign administrators, etc.—Nor has it been thought proper to consider the right of suit granted to foreign administrators, executors, or receivers, since their rights would have to be first considered in connection with the subject of conflict of laws.

§ 78. Married women.—And the right of married women, whether non-resident or resident, to sue in chancery need only be referred to, because their right to sue is the same as if they were sole.[60]

That brings us to the second part of the question who are capable of being parties to suits in chancery.

Ala. 627; First Nat. Bank v. Tyson, 133 Ala. 459.

[59] Cabbell v. Williams, 127 Ala. 320; First National Bank v. Tyson, 133 Ala. 459; Dennis v. Mob. & Mont. Ry. Co., 137 Ala. 649.

[60] Code of 1907, § 4493; Code of 1896, § 2527.

PART II.

Of the Parties Against Whom a Suit May be Instituted in Chancery.

§ 79. Any sane adult may be made defendant.—A suit in chancery may be brought in Alabama against any person of sound mind and over twenty-one years old upon whom personal service of process may be had, making him a defendant in his own name; but we have seen that the right to sue residents is limited by the requirement that action be brought in particular places, generally the district of their residence.[61]

§ 80. Non-resident defendants.—The right to sue non-residents upon whom personal service is had in this State, is not restricted by limitation upon locality of suit,[61] or other important statutory limitation. But the right to sue non-residents upon whom service of process cannot be had is purely statutory and limited. "It is not of every case of equitable cognizance against such defendants that the court may take jurisdiction. The statute defines with precision the cases in which the court may intervene. The object of the suit must concern lands or personal property situate in the State; or the cause of action must have originated here; or the performance of the act which is to be compelled, the parties must have contemplated should be here performed."[62] The non-resident defendant upon whom service of process cannot be had must be given notice of the suit by publication,[63] and certain forms must be followed, as we shall see later, before a decree obtained against him can be enforced earlier than a year after its rendition.[64] Suits against resident defen-

[61] See Chapter II ante.

[62] Per Brickell, C. J., in Sayre v. Elyton Land Co. 73 Ala. 85, 98. The Code of 1907, § 3054, provides that courts of chancery may take cognizance of cases in equity (2) "Against non-residents, when the object of the suit concerns an estate of, lien, or charge upon lands, or the disposition thereof, or any interest in, title to, or encumbrance on personal property within this State, or where the cause of action arose, or the act on which the suit is founded, was to have been performed in this State."

[63] Code of 1907, § 3104; Code of 1896, § 686.

[64] See Chapter XIII post.

dants upon whom service cannot be had by reason of their protracted absence from the State may likewise proceed on publication of notice without service of process, after they have been absent six months from the filing of the bill.[63]

§ 81. Unknown defendants.—The statutes also provide for suits against persons unknown to the plaintiff, when it becomes necessary, by reason of some interest in them, to join them with named persons as defendants to a bill. But the plaintiff to avail himself of this statute must annex to his bill an affidavit "that the names of such persons are unknown, that he has made diligent inquiry to ascertain the same, and that their residence, as he believes, is not in this State. And the register must make publication as in case of non-residents describing such unknown parties, as near as may be, by the character in which they are sued, and with reference to their title or interest in the subject matter."[65] Of course this jurisdiction is limited, like the jurisdiction against non-residents, and the statutes must be strictly followed.[66]

§ 82. Married women defendants.—A suit in chancery may be brought in Alabama against a married woman without joining her husband with the same freedom as if she were sole. One section of the Code provides that a wife must be sued as if she were sole upon all contracts made by her or engagements into which she enters; and another section provides that "all property of the wife held by her previous to the marriage, or to which she may become entitled after the marriage, in any manner, is the separate property of the wife, and is not subject to the liabilities of the husband."[67] So while there is no express provision that she shall be sued alone in matters concerning her real or personal property, the Supreme Court has held that "the spirit and policy of the statute are that the wife must sue and be sued alone in all cases either at law or in equity involving her statutory separate estate."[68]

[65] Code of 1907, § 3106; Code of 1896, § 690.

[66] Bingham v. Jones, 84 Ala. 202; Bell v. Hall, 76 Ala. 546; City of Opelika v. Daniell, 59 Ala. 211.

[67] Code of 1907, § 4493, § 4486.

[68] Marshall v. Marshall, 86 Ala. 383, 389; Ramage v. Towles, 85 Ala. 588; Kimbrell v. Rogers, 90 Ala. 339. These decisions seem to overrule Sims v. National Commercial Bank, 73 Ala. 248; but in view of the fact that the

§ 83. Married men as defendants.—It must be noted on the other hand that in certain cases a husband cannot be sued alone as freely as a wife. Since the decision in the case of Kimbrell v. Rogers a husband cannot be sued alone in an action to foreclose a mortgage in the execution of which his wife had joined; for the wife was made a party on the theory that notwithstanding her release she must be joined as a defendant to bar her right of dower.[69] The soundness of this decision may be doubted, however, if the wife's joining in the mortgage is done to release the dower instead of to mortgage it.[70] And as the wife has no actual interest in the land by way of dower so long as her husband is alive and her dower inchoate only,[71] it could hardly be said that her release in the mortgage was in any way short of complete.

§ 84. Married men as defendants (continued).—Again there would seem no reason for joining a wife in a suit to recover property claimed by her husband, if it is not necessary to join a husband in a suit to recover property claimed by his wife;[68] for the law is just as unqualified that a wife cannot alienate her property without being joined in the deed by her husband, as it is that a husband cannot bar the dower right without the release of his wife.[72] And yet if this decision in Kimbrell v. Rogers[69] is sound, it is necessary to make a wife a party defendant even after she has released her dower, and it is not necessary to make a husband a party defendant when he has given no release of his rights at all.[73]

§ 85. Insane persons defendants: affidavit of insanity sufficient.—While persons made defendants are of course entitled to the same presumption of sanity that they would have if plaintiffs,[74] an affidavit of insanity is sufficient to overcome the presumption in the case of defendants until they themselves

husband probably has an inchoate interest in his wife's real property by statute, if not by courtesy initiate at common law, the decision in Sims v. National Commercial Bank may be reaffirmed.

[69] Kimbrell v. Rogers, 90 Ala. 339.

[70] Code of 1907, § 3818; Code of 1896, § 1509.

[71] Wilkinson v. Brandon, 92 Ala. 530; Reeves v. Brooks, 80 Ala. 26.

[72] Code of 1907, §§ 4494, and 3818.

[73] See cases in note (68) supra.

[74] See § 55, ante.

bring their sanity to an issue. The statute provides[75] that "when a party [defendant?] to a suit, or other proceedings in chancery, is alleged to be of unsound mind, and to have no legal guardian, [that is to say, has not been determined insane by legal proceedings,] such a party may be brought into court by service of process personally upon him [just as if he were sane] and a guardian ad litem appointed for such person, as in case of infants over fourteen years of age who fail to select or nominate a guardian ad litem." The procedure referred to in appointing guardians ad litem for infant defendants requires merely an affidavit of the fact of infancy; and this may be complied with either by swearing to the bill containing the allegation, or by filing a separate affidavit at a later time. Then, after providing the affidavit of the defendant's unsoundness of mind, and after the expiration of thirty days from the return of process, or after the expiration of thirty days from the perfection of notice by publication in cases where publication is necessary, the chancellor or register in vacation, or the chancellor in term time, will appoint as guardian ad litem for the insane person some proper person who consents in writing to act.[76] No further proof of the defendant's insanity is necessary; and the cause then proceeds upon the assumption that the defendant is insane as alleged.

§ 86. Practice justified.—Nor is this unjust to the defendant; for having been personally served with process, he may appear himself in court if actually sane, and deny any allegation in the bill that he is of unsound mind, or any affidavit filed before his appearance; thereby making his sanity a question of fact for the court.[77] And if he is sane but fails to appear, he is better off for being taken insane; since the cause could proceed against him as a sane person on a decree pro confesso, as we shall see, dispensing with proof of the bill; whereas as a person of unsound mind the court takes him under its especial care, appoints a guardian of his interests,

[75] Code of 1907, § 3101. The wording in brackets is inserted by the author to show the necessary intent of the statute. It is unchanged from the last Code.

[76] Chancery Rule 23, Code of 1907. But see § 93, post.

[77] Kennedy v. Kennedy, 2 Ala. 625; Alexander v. Alexander, 5 Ala. 517; Atwood v. Smith, 11 Ala. 894.

and requires the bill to be proved to the letter. Moreover if the defendant is not in fact insane, since there is no decree pro confesso, there could be no reason why he should not appear at any time before final decree, and be allowed to defend upon such terms as the court should think just to the plaintiff. But as the statute does not require that the defendant be actually insane for the appointment of his guardian ad litem to be good, but merely that he be alleged on oath to be insane, it is not likely that the terms upon which he would be allowed to defend on the merits would be easier than those granted to a defendant against whom a decree pro confesso is taken.

§ 87. Practice amounts to judgment of insanity by default.—The appointment by the court of a guardian ad litem after service of process upon the defendant, is in the nature of a judgment by default against him of the fact of his insanity; and to admit him to defend involves the setting aside of this quasi judgment.

If the defendant is actually insane at the time of the appointment of his guardian ad litem, but regains his sanity afterwards, he would unquestionably be allowed to prove this to the court on proper application and be allowed to conduct the cause from then on as he saw fit.

§ 88. Guardian ad litem required.—If the defendant is actually insane, the forms should be strictly observed; for it would seem that in suits against insane persons, as in suits against infants, a decree cannot be supported on appeal without a guardian ad litem having been appointed below as required by law.[78] But it seems that service of process gives the court jurisdiction, and once having gained jurisdiction, failure to appoint a guardian ad litem would probably not be ground for collateral attack upon a final decree thereafter rendered.[79] Indeed, prior to the enactment of section 3334 in the Code of 1867, and the statute upon which that section was based, Acts of 1862-3, p. 25, there was no authority whatever to appoint a guardian ad litem for an insane person. When suit

[78] Woods v. Montevallo C. & I. Co. 107 Ala. 364; Dailey's Admr. v. Reid, 74 Ala. 415; Roach v. Hix, 57 Ala. 576.

[79] Levystein v. O'Brien, 106 Ala 352.

was brought against a person of non-sane mind, if an infant he was defended by guardian, and if an adult he had to be defended by an attorney, to be appointed for the purpose by the court, if necessary.[80]

§ 89. But no guardian ad litem if there is a guardian.—The statute above discussed, section 3101 of the Code of 1907, applies, it will be noted, only to suits in chancery against persons of unsound mind who have no legal guardian. If the person has been duly adjudicated in the manner provided by statute to be of unsound mind, and a guardian appointed for him by a court of competent jurisdiction, which in Alabama is the probate court, acting under statutory jurisdiction,[81] or possibly also the chancery court, acting under its original jurisdiction,[82] the insane person and his guardian should both be made parties defendant.[83] There seems to be no authority to appoint a guardian ad litem for an adult insane person who has a guardian.[84] And an adjudication of insanity in another

[80] Ex parte Northington, 37 Ala. 496.

[81] Code of 1907, Chapter 92, Art. 2.

[82] There is no doubt that the chancery court can hold its own inquest, with or without a jury, and determine the sanity or insanity of a party to the cause. Eslava v. Lepretre, 21 Ala. 504; Alexander v. Alexander, 5 Ala. 517. And it may be that the chancery court may hold an inquisition under original proceedings to declare a person insane without other questions being involved in the suit except the appointment of a general guardian to preserve his estate, but no Alabama decision has been found upon the subject. For an interesting collection of authorities and a conclusion that the chancery courts in America have no such power, see 3 Pomeroy Eq. 3rd Edition §§ 1311-1314.

In England the authority to determine the sanity of persons and to hold inquests to that end upon petition or information was committed by the crown to the Lord Chancellor, (I Bl. Com. 305); so that it was a part of his personal jurisdiction. Compare the discussion as to infants being wards of the chancery court under its original jurisdiction in Lee v. Lee, 55 Ala. 590.

[83] 1 Daniell Ch. Pr. 202.

[84] The statute upon suits in chancery, § 3101, Code of 1907, we have seen does not apply. The general statute, § 2477, Code of 1907, probably does not apply to chancery. West v. West, 90 Ala. 458, if indeed its wording is broad enough to do so any way. And without statute, there is no authority to name one. Ex parte Northington, 37 Ala. 496; Walker v. Clay, 21 Ala. 797.

court cannot be collaterally attacked,[85] provided, of course, jurisdiction of the insane person was acquired, and notice was properly given to him.[86]

§ 90. When guardian adversely interested.—If the guardian, has adverse interests, or refuses to act in the cause, or is out of the district, or is a non-resident acting under authority of the courts of another State only, and has not been recognized in this State, the court would probably hold that the defendant had no guardian; and either appoint a guardian ad litem for him under the statute, or appoint an attorney to defend his interests without a guardian ad litem.[87]

§ 91. Infant defendants: new statutes.—Infant defendants in chancery are provided for by special new statutes, sections 4482, 4483, and 4484 of the Code of 1907, besides the general statute, section 2476 of the Code, if the latter is applicable to their case. But we have seen in discussing infant plaintiffs[88] that it may be doubted whether section 2476 applies to chancery at all; so that, so far as the method of making infants parties is concerned, we must follow the new statutes and the English rule. By that practice infants were made parties defendant in their own names; and it was not necessary to join any one with them, whether they had a general guardian or not. Indeed it was not necessary even to allege in the bill that they were infants.[89] Nor is it necessary to do so in Alabama; but there has long been a statutory rule of practice in Alabama that in order to have a guardian ad litem appointed for the infant, if the bill does not allege the defendant's infancy and whether he is over or under fourteen years of age, and that under oath, affidavit must be filed later setting forth these facts.[90]

§ 92. Where infant has general guardian he should be a party.—Now the new section 4482 of the Code of 1907 pro-

[85] Craft v. Simon, 118 Ala. 625.

[86] Eslava v. Lepretre, 21 Ala. 504.

[87] 1 Daniell Ch. Pr. 203; Walker v. Clay, 21 Ala. 797; Ex parte Northington, 37 Ala. 496.

[88] See § 61, et seq., ante.

[89] 1 Daniell Ch. Pr. 203. A guardian ad litem could be appointed after service and default of the infant to answer by guardian of his own selection. 1 Daniell Ch. Pr. 534, 548; 2 Daniell Ch. Pr. 865.

[90] Code of 1907, Chancery Rule 23; Hibbler v. Sprowl, 71 Ala. 50.

vides, that the infant's general guardian, if there is one, not interested adversely to the infant, must defend for him both at law and in equity, and provides for a guardian ad litem only in case there is no general guardian; but this statute does not require the general guardian to be made a party to the bill, nor that his existence as a properly appointed general guardian be shown by affidavit. So as the law now stands, in cases where the infant has a general guardian, the plaintiff will be at a loss how to proceed, unless the general guardian comes in voluntarily;[91] and the court will be unwilling to allow his voluntary appearance without examination of the record of his appointment; which in the case of appointments other than local, will present difficulties. If the infant defendant has a general guardian in this State the better practice would seem to be to make the guardian a party too. For where the infant has no living parents, but has a guardian not interested against him, service of process against the infant, we shall see, must be upon the guardian; and to that end the truth of the particular guardianship of course must be proved; whereas if the guardian is made a party also, it has been stated by the court that no proof of his guardianship need be offered.[92] If, on the other hand, the infant has a living parent, so that service of process must be upon that parent and not upon the guardian, then clearly the guardian should be made a party also, to avoid the situation of having the infant defendant properly in court without any way to take a decree against him.

The new section 4482 of the Code of 1907, does not say whether it applies to non-resident infants and non-resident general guardians as well as resident infants and guardians. But it is safe to presume that where non-resident infants have to be sued in Alabama, it will not be necessary for their non-resident general guardians to defend for them. So in that case, and in all cases where the infant defendant has no

[91] But compare Irwin v. Irwin, 57 Ala. 614, holding that a general guardian cannot enter an appearance so as to confer upon the court jurisdiction to render a decree which cannot be set aside on appeal.

[92] Gayle v. Johnson, 80 Ala. 395.

general guardian in Alabama, a guardian ad litem will have to be appointed by the court under the old rule of chancery practice, number 23 of the Code of 1907; for the new statute merely provides that if there is no general guardian, the court must appoint a guardian ad litem, without saying how it shall appoint him.

§ 93. Guardian ad litem must not be connected with plaintiff, nor be suggested by him.—It provides, however, that the judge must not appoint as guardian ad litem any person related by blood or marriage within the fourth degree to either the plaintiff or his solicitor, or to the judge or the clerk of the court, or any person connected in any manner with the plaintiff or his solicitor. And section 4483 provides that if the judge knowingly appoints as guardian ad litem any such person, he shall be liable to $200. penalty at the suit of the infant.

Moreover section 4484 prohibits under the same penalty that the plaintiff, his attorney, or any one for him should even suggest any person whatever to be appointed as guardian ad litem for a defendant infant, and forbids the court to appoint a guardian ad litem under such a suggestion.

§ 94. Existence of parents does not avoid guardian ad litem.—The existence of living parents of the infant defendant of course would not dispense with the necessity of a guardian ad litem; for the parents have not been charged with the legal trust of protecting the infant's estate. They are "in no proper sense the representatives of the infant except for the purpose of receiving service of process for him."[93]

§ 95. How infant served with summons.—Having determined whether the infant is to be sued with a general guardian as co-defendant with him,[94] or whether he has no guardian and is to be sued alone, and a guardian ad litem appointed, the next step is to bring the infant into court; for that must be done before the guardian ad litem can be appointed. The statutes provide clearly how infants shall be

[93] Irwin v. Irwin, 57 Ala. 614.

[94] To determine whether there is a general guardian, of course both probate court and chancery court records must be examined.

served and brought into court. Summons must be served upon their parents, or either of them, if in life, and if the interest of the parents is not adverse to that of the infants; and this whatever the infant's years may be.[95] But if the parents are both dead, or if their interest is adverse to that of the infants, then the summons issued against the infants must be served upon their general guardian, if they have one and his interest is not adverse.[96] And it may be doubted whether the general guardian can accept service.[97] If the infant has no general guardian in the State, and no parents, then if the infant be over fourteen years old, service of process must be had upon him personally, and if he be under fourteen, then upon the person who has his care and maintenance, unless of course, interested adversely to him.[98]

§ 96. Non-resident infants.—If the infant be a non-resident of Alabama, and the plaintiff or his agent make affidavit of the fact, or swear to the bill so alleging or alleging that in the plaintiff's belief the infant is a non-resident, or that his residence is unknown, or even apparently if the infant be a resident, but has been out of the State six months since the filing of the bill, then whatever be the infant's age, notice must be given him by publication before the cause can proceed.[99] And should there be any case not provided for by the statute or chancery rule, and proof be made before the chancellor or

[95] Wells v. Am. Mtge. Co. 109 Ala. 430; Hibbler v. Sprowl, 71 Ala. 50; Chancery Rule 20; McIntosh v. Atkinson, 63 Ala. 241; Cook v. Rogers, 64 Ala. 406; Sanders v. Godley, 23 Ala. 473.

[96] Chancery Rule 20; Gayle v. Johnston, 80 Ala. 395.

[97] Irwin v. Irwin, 57 Ala. 614.

[98] Chancery Rule 20. Where it is difficult to tell whether the parent or guardian is interested adversely or not, it is best to serve both the parent or guardian and infant personally and then act under Rule 20 as the court directs.

[99] Chancery Rule 22; Woods v. Montevallo C. & I. Co. 107 Ala. 364; Irwin v. Irwin, 57 Ala. 614. Prior to the enactment of this rule in its present form, it was necessary to bring in non-resident infants after publication of notice by sending a copy of the notice to the parent, guardian, or other person, if known, upon whom service of process would have to be made for the infant if resident. Clarke v. Gilmer, 28 Ala. 265. This decision rested upon Chancery Rule 41 of the Code of 1852. It must not be overlooked that that rule is no longer in force, so that Clark v. Gilmer, is not law now.

register, he may direct the mode of service, or appoint a guardian ad litem for such infant without service.[1]

§ 97. On appeal record must show rules obeyed.—The particular rule applying to the case must be strictly followed, or the whole proceeding may be set aside on error, appeal, or review. "When a decree against an infant defendant is assailed on error, the uniform ruling of the court has been that it cannot be supported unless the record shows affirmatively that in the precise mode the statutes and rules of practice prescribe, the infant has been brought before the court, and to represent and defend in his behalf a guardian ad litem has been appointed;"[2] that is, of course, when he does not defend by his general guardian.

§ 98. Collateral attack.—But if the infant has been properly made a party defendant to the bill, even though service upon him was not had, the irregular appointment of a guardian ad litem has been held to be voidable only, and if the error is not assigned in the Supreme Court, the decree will be allowed to stand.[3] So a fortiori if a guardian ad litem is appointed for an infant who is a party to the suit, but before he has been properly served, the subsequent service of the infant makes the appointment of the guardian ad litem sufficient, unless the irregularity is assigned as error.[4] Indeed, it has been held that if the infant is within the jurisdiction of the court, any action of the court in appointing a guardian ad litem for him, whether with or without service, is binding upon collateral attack. This is held upon the theory that "the chancery court is the general guardian of all infants within its jurisdiction, and by virtue of its general powers has authority to protect their rights when defendants in that court, by the appointment of a guardian ad litem.[5] The reason

[1] Chancery Rule 20. Code of 1907.

[2] Per Brickell, C. J., in Woods v. Montevallo C. & I. Co. 107 Ala. 364; Hibbler v. Sprowl, 71 Ala. 50; Rowland v. Jones, 62 Ala. 322; McIntosh v. Atkinson, 63 Ala. 241; and other cases too numerous to cite.

[3] Preston v. Dunn, 25 Ala. 507.

[4] Bondurant v. Sibley's Heirs, 37 Ala. 565.

[5] Per Goldthwaite, J., in Preston v. Dunn, 25 Ala. 507. This decision seems not to have been reaffirmed, but it was cited with approval in Waring v. Lewis, 53 Ala. 615. The generalization of

for limiting the parenthood of the court of chancery to infants within the jurisdiction, so that it would not be the protector of the Alabama property of non-resident infants, is not very clear, however. And yet the non-resident infant is rather the more fortunate of the two if errors in depriving him of his property are not binding upon him even upon collateral attack, while they are binding upon his little resident cousin.

§ 99. Collateral attack (continued).—But whether that distinction is law or not when service upon the infant is not had, certain it is that where service (or probably publication to non-residents) is had properly upon the infant, not even a total failure to appoint a guardian ad litem where one was required by law, will invalidate a judgment against the infant on collateral attack.[6]

What effect the new statute, section 4482 of the Code of 1907, will have where error is not assigned for failure of the general guardian to defend for the infant, or what consideration will be given the omission on collateral attack cannot be told, of course.

§ 100. When there is no general guardian, guardian ad litem necessary.—Let it be understood then that in all cases where the infant has no general guardian, or where he has a guardian interested adversely to him, or probably where the infant and his general guardian are both non-residents of Alabama, the infant must be defended by a guardian ad litem; and the record must affirmatively show an order appointing a guardian ad litem. All the recent decisions are affirmative of the law being so broad as that,[7] although the early decisions probably did not require it. That is, it is necessary in order to sustain

the law in Waring v. Lewis is different, however. "A judgment or decree, rendered against an infant represented by a guardian ad litem, is binding, and can be impeached only upon grounds which would be available if he were an adult." Of course this would enable him to attack a decree rendered against him without personal service. To that extent it is dictum, however.

[6] Levystein Bros. v. O'Brien, 106 Ala. 352; Waring v. Lewis, 53 Ala. 615.

[7] Woods v. Montevallo C. & I. Co. 107 Ala. 364; Levystein v. O'Brien, 106 Ala. 352; Griffith v. Fentress, 91 Ala. 366; Ashford v. Patton, 70 Ala. 479; Irwin v. Irwin, 57 Ala. 614.

a judgment on error or appeal to the Supreme Court. On collateral attack, however, as we have seen, provided the infant was properly brought before the court, a failure to appoint a guardian ad litem will not vitiate the decree.[8] But the conclusion to be drawn from records by the court in future, now that the new statute[9] requires the general guardian to defend, if there is any, may be different on all these points; since the statute does not require the general guardian to be made a party himself, and his appointment, not having been made in the cause, cannot be in the record. Prior to the new statute the general guardian could not accept service for the infant, or even file an answer for the infant without being served with process[10]; for there would be nothing to show that he was the infant's general guardian.[11] Moreover a guardian ad litem is not personally responsible for costs;[12] and as there is no reason why a general guardian should be personally responsible for costs, costs being chargeable to parties only, there will be no record evidence in the decree for costs to show that the general guardian had defended.

§ 101. Appointment of guardian ad litem: infant may select. —Infants of fourteen years of age or over are entitled to select their own guardian ad litem; and they have thirty days after the summons, or after the perfecting of publication, within which to appear before the chancellor or register in vacation, or before the chancellor in term time, and make known their choice. Or the infant may have his or her choice of a guardian ad litem certified by a justice of the peace. At the expiration of this thirty days, if the infant has made known no choice, the chancellor or register in vacation, or the chancellor in term time, shall appoint a guardian ad litem for the infant; but this guardian ad litem, even though properly appointed,

[8] Levystein v. O'Brien, 106 Ala. 352.

[9] Sec. 4482, Code of 1907. Under the former practice there were some early decisions that where there was a general guardian the appointment of a guardian ad litem was unnecessary. Rhett v. Martin, 43 Ala. 96; Cato v. Easley, 1 Stewart, 214.

[10] Irwin v. Irwin, 57 Ala. 614; Darrington v. Roseland, 3 P. 10.

[11] Compare Gayle v. Johnston, 80 Ala. 395.

[12] Ward v. Matthews, 122 Ala. 188; Perryman v. Burgster, 6 P. 99.

may be superseded by the infant appearing before the chancellor in term time, and making choice of another guardian ad litem, if the new choice puts in an answer for the infant forthwith.[13]

§ 102. Appointment of guardian ad litem (continued).—And it is not necessary for the infant to appear in court to have a guardian ad litem who has been appointed by the court without his consent superseded by his own choice; for he can accomplish it by going before a justice of the peace and having the justice certify his choice to the court or the chancellor or the register; and then the proposed guardian ad litem will be allowed to act, provided he files an aswer for the infant at once.[13]

§ 103. Chancellor supervises infant's choice.—While the rule does not say that the choice of the infant must not be followed if in the opinion of the court unwise, it must be taken for granted that the supervision of the court over the choice of the infant is as complete as over his acts; and there could be no error in the chancellor's refusing to appoint any special choice of the infant as guardian ad litem for him if the chancellor concluded that the person was unfit to act. And if the infant refused to make a second choice, the chancellor could appoint a choice of his own.

§ 104. What time allowed infant to select.—Exactly what opportunity in a given case should be granted an infant to make a choice of his guardian ad litem may be difficult to decide. In England service of process was always upon the infant personally; so that the return would show that he had such notice of the suit as his discretion allowed him to receive.[14] And then if no appearance was made for the infant, by the 32nd. order of May, 1845, application and a motion could be made by the plaintiff to have a guardian ad litem appointed for him, notice of which application was given the father or guardian of the infant, and the application set down for hearing.[15] If, however, some person desired and offered to defend for the infant, the infant himself if in London had to appear in court and have his guardian appointed, and if resident out

[13] Chancery Rule 23, Code of 1907.

[14] 1 Daniell Ch. Pr. 500.

[15] 1 Daniell Ch. Pr. 534, 548.

of London, had to appear before commissioners appointed to assign a guardian ad litem for him.[16] By this practice little chance for fraud intervened.

§ 105. What time allowed infant to select (continued).—But in Alabama where service of process is upon the parent or guardian, an infant over fourteen may never know that a suit has been brought against him, and that he had the right to select his defender. In Walker v. Hallett,[17] an early decision, our court said, "Our statute gives to minors over fourteen years the right to choose their own guardian, and confers the power to appoint a guardian on the judge of the county court only in the event they fail to exercise this right.[18] We do not say that in chancery the infant's right of choice is absolute; but that his nomination should be approved, unless there be some good reason for rejecting it. * * * We are of opinion that it is not absolutely necessary that the infant should be brought personally before the court to enable the court to appoint a guardian ad litem; such has not been our practice hitherto." The court then proceeded to hold that the English practice above described was unnecessary without indicating what must be followed. So without any express authority, the practice has grown up, to treat the word "fail" just as default by a person of full age, and for the chancellor to use his best judgment in appointing a fit person as guardian ad litem.

§ 106. When infant is under fourteen.—If the infant defendant is under fourteen, the Alabama rules provide no choice for him; and after he has been properly served with process, the choice of a guardian ad litem is probably left to the discretion of the chancellor. We have another chancery rule, however,[19] that where no rules or decisions are to the contrary, the English rules of practice up to 1845 apply. So if an infant under fourteen appeared in court and expressed a clear preference for a proper person to act as his guardian ad litem, the court should confirm that choice.

§ 107. When court appoints without infant being served.—If the infant defendant fell under the category of "any case

[16] 2 Daniell Ch. Pr. 865, et seq.

[17] 1 Ala. 379, 388.

[18] The wording of the present Chancery Rule 23 is the same.

[19] Chancery Rule 7, Code of 1907.

not provided for by statute" as to service of process upon him, so that by Rule 20, the chancellor may prescribe the method of service, or appoint a guardian ad litem without service,[20] the universal practice is to appoint a guardian ad litem without notice to anybody. But the court must be careful not to offend the new sections 4482-3-4 of the Code of 1907, by appointing some one suggested by the plaintiff or his attorney, or some one related to the plaintiff or his attorney or to the court.

§ 108. Affidavit of infancy required.—The fact of infancy as foundation for appointing a guardian ad litem is established by affidavit of the plaintiff to the bill alleging it, or by separate affidavit without testimony, and the belief of the affiant must be added as to the infant's being over or under fourteen years old.[21] This provision has already been discussed under the head of infant defendants, and the practice supported.[22] It has been suggested that the fact of infancy must be positive, and not upon information and belief; but while as a practice that is best, the appointment of a guardian ad litem for one who is in fact an infant, would hardly be invalid because the affiant merely swore to his information and belief of it. The affidavit is probably only to instruct the court.[23]

§ 109. Guardian ad litem must consent in writing to act.—The court can never appoint as guardian ad litem any person without his consent in writing to act as such;[24] and the practice is for him to consent at the same time that he is appointed. And the guardian ad litem is responsible for more than formal duties. He is expected to deny all the allegations of the bill, whether he believes them to be true or not; for a decree based upon the admission or consent of the guardian ad litem is error.[25] The plaintiff must prove his cause against the infant,

[20] Chancery Rule 20, Code of 1907.

[21] Chancery Rule 23, Code of 1907.

[22] See § 85, et seq., ante.

[23] Lord Langdale, M. R., seems to have originated the requirement of an affidavit of infancy, after a guardian ad litem had been appointed for an alleged infant who turned out to be thirty years old. 2 Daniell Ch. Pr. 866; Lingren v. Lingren, 7 Beavan 66.

[24] Chancery Rule 23, Code of 1907.

[25] Mitchell v. Hardie, 84 Ala.

and the guardian ad litem must be in a position to contend for every right that the evidence may show the infant to have. For the same reason the same guardian ad litem cannot be appointed to represent adverse interests.[26] And finally it must be noted that with all forms and technicalities observed, it still remains the court's highest duty in a cause to protect the infant defendant; for after all, his chief protection lies in the conscientiousness of the chancellor.

§ 110. Decree binding on infant.—In England no decree depriving an infant of property used to be made final without giving the infant six months after he should become twenty-one to show the court good cause against it.[27] But with us such saving of his rights has never been made; and if an infant is defended in Alabama by a guardian ad litem, the final decree is as binding upon him as if he were of full age.[28]

§ 111. Corporations as defendants.—Private corporations, whether domestic or foreign, generally may be made parties defendant in chancery to bills for relief, and after the perfection of service of process against them the suit may proceed as against individuals. If the corporation be domestic, it may be served with process by executing it "upon the president or other head thereof, secretary, cashier, or managing agent thereof." And if affidavit is made that such officer or managing agents are unknown, or are absent from the State, or reside out of the State, the process may be served upon any white person in the employ of the corporation or doing business for it.[29] But if the defendant corporation make default of appearance, a decree pro confesso cannot be taken against it, as we shall see, without an affidavit that the person served actually held the position which he was predicated to hold as a basis for service upon the corporation through him.

§ 112. Foreign corporations treated as non-resident persons.—If the corporation be foreign, process may be served upon it by executing it upon any agent of the corporation, or upon

349; Hooper v. Hardie, 80 Ala. 114; Waring v. Lewis, 53 Ala. 615.

[26] Estes v. Bridgforth, 114 Ala. 221.

[27] 1 Daniell Ch. Pr. 207.

[28] Waring v. Lewis, 53 Ala. 615.

[29] Chancery Rule 21, Code of 1907.

any white person in its employ in this State, or by publication; in which case a copy may be sent to any of the officers above named as proper persons upon whom to serve process upon domestic corporations.[30]

If the summons to answer a bill against a foreign corporation is executed upon an agent or other person in its employ, that particular agent or employee may be required to answer on oath just as other defendants to bills.[30] If service upon the foreign corporation be had by publication only, however, a decree is good against it only so far as a decree would be good against a non-resident individual over whom jurisdiction was gotten by publication; for Alabama laws make no distinction in this particular between non-resident natural persons and foreign corporations.[31] Therefore chancery jurisdiction to entertain suits against foreign corporations is statutory only, and exists when the object of the suit concerns an estate of lien, or charge upon lands within this State, or the disposition thereof, or any interest in, title to, or encumbrance on personal property within the State, or when the cause of action arose in this State, or when the act on which the suit is founded was to have been performed in this State.[32]

§ 113. Discovery against corporations.—If the bill be for discovery, on the other hand, since a corporation itself cannot swear, it is held proper to join as an additional party defendant the particular officers who are supposed to be possessed of the particular evidence desired.[33] And it is held, though by way of dictum, that such officers are necessary parties defendant.[33]

§ 114. Municipal corporations as defendants.—Municipal corporations may also be made parties defendant to a bill in chancery; and service of process may be had upon the cor-

[30] Chancery Rule 21, Code of 1907.

[31] Iron Age Pub. Co. v. Western Union Tel. Co. 83 Ala. 498, 505.

[32] Iron Age Pub. Co. v. Western Union Tel. Co. 83 Ala. 498; Pullman Palace Car Co. v. Harrison, 122 Ala. 149; Rucker v. Morgan, 122 Ala. 308, 319.

[33] Legrande v. McKinzie, 110 Ala. 493; Va. & Ala. Mining & Mfg. Co. v. Hale, 93 Ala. 542.

poration by serving it upon the mayor; but before a decree pro confesso may be had, proof must be produced that the person served was actually the mayor, as the sheriff's return is not evidence of that fact.[34]

§ 115. The State of Alabama cannot be made defendant.— The State of Alabama shall never be made defendant in any court of law or equity. The Constitution of 1875 provided to that effect; and it has been re-enacted in the constitution of 1901.[35] Prior to 1875, the State could be sued under conditions provided by law;[36] so decisions may be found supporting that right which are no longer law.

Some recent decisions have extended the meaning of the constitutional prohibition far beyond its wording, however; and it may now be said to be law that any arm or enterprise of the State, although separately incorporated, is within the meaning of the clause. Thus a bill in equity cannot be brought against the warden of the state penitentiary for specific performance of a contract for hire of convicts.[37] And the Alabama Insane Hospital, a body politic, is an arm of the State and cannot be sued at law in tort.[38]

The latter case held that the action at law was not authorized by the act of the legislature creating the corporation. But since that decision, it has been twice held that the clause in the Act creating the Alabama Girls Industrial School a body corporate, in which the General Assembly authorized suit to be brought against it, was unconstitutional; so that a bill in equity against that corporation will not lie on the ground that it is an arm of the State.[39]

These cases are especially dangerous, because if their reasoning should be carried too far for the practical good of the institution, the legislature cannot limit their effect; for a limit

[34] Lyon et als. v. Lorant, 3 Ala. 151.

[35] Const. of 1875, § 15; Const. of 1901, § 14.

[36] Const. of 1868, § 16.

[37] Comer v. Bankhead, 70 Ala. 493.

[38] White v. Ala. Insane Hospt. 138 Ala. 479.

[39] Ala. Girls Industrial School v. Reynolds, 143 Ala. 579; same v. Adler, 144 Ala. 555.

would be as completely beyond the constitutional power of the legislature as the Act already held invalid.[40]

[40] In the Bank of Kentucky v. Wister, 2 Peters (U. S.) 318, the Bank of Kentucky had pleaded to an action for money had and received instituted to recover the amount of a deposit, that the State of Kentucky was sole proprietor of the stock of the bank and that the suit was therefore virtually against a sovereign State; and the court, Johnson, J., delivering the opinion, pointed out that if the State imparted to the bank its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit, a violation of the federal constitution which the State of Kentucky doubtless intended to avoid by incorporating the bank.

And in the Bank of U. S. v. Planters Bank of Ga. 9 Wheaton (U. S.) 904, Marshall, C. J., held that the Planters Bank of Georgia, of which the State of Georgia was an incorporator, was not the State of Georgia within the 11th amendment of the U. S. Constitution, providing that suit may be brought against a sovereign State in the Supreme Court of the U. S. only.

CHAPTER IV.

Of the Parties to a Suit.—(Continued.)

Of the Proper and the Necessary Parties.

§ 116. Some persons may be made parties or not as plaintiff elects.—Having ascertained who are capable of suing and of being sued respectively in chancery, we now come to investigate who are the persons with respect to a given altercation who should be made parties in order to obtain the adjudication of the court before which the cause is brought.

There are not infrequently persons in some way or other connected with the matters in dispute who may be made parties to the cause, if the plaintiff sees fit to have them so, and yet they are in no way necessary to its proper determination. Such persons are termed proper parties but not necessary parties to a cause. That is to say, they have the inherent capacity to appear in chancery under the qualifications pointed out in the last chapter, and they are interested sufficiently in the matter of a given suit for the plaintiff to bring them in as parties to his bill; but he need not do so if he does not see any advantage to his own case in their presence.

§ 117. Examples of proper but unnecessary parties.—Such proper but unnecessary parties are sometimes associated as defendants to the bill, and are sometimes associated as plaintiffs to the bill. Thus, where one of several legatees under a will sues the representatives of the testator for his legacy, it is not improper to join as defendants to the bill the other legatees also. But it is not absolutely necessary that they be joined; for while they are all interested in the subject matter, they are not interested in the object of the suit.[1] So where a plaintiff sues to restrain the erection by the defendant of a mill dam upon property just purchased but not

[1] Milsap v. Stanley, 50 Ala. 319.

yet conveyed to him, it is not improper to join as defendant the vendor of the land also, as the owner of the legal title; but it is not necessary to do so.[2] Again an insolvent debtor, or his personal representative if the debtor is dead, is not improperly made a defendant to a bill by a judgment creditor to set aside a fraudulent conveyance of his property; but he is not a necessary defendant, because he has no real interest. The fraudulent purchaser is entitled to set up all the defences which his vendor the debtor could offer, and if any balance remains after the plaintiff's debt is paid the fraudulent purchaser would be entitled to it, and not the debtor or his representative.[3] It is also held that the personal representative of a deceased mortgagor is not a necessary party to a suit by the mortgagee to foreclose the mortgage, although of course he is not an improper party.[4]

So on the side of the plaintiff, where commissioners appointed to sell lands for division have taken notes for deferred payments payable to themselves, they need not be made plaintiffs along with the persons entitled to the pro-

[2] Ogletree v. McQuaggs, 67 Ala. 580.

[3] Coffey, Admr. v. Norwood, 81 Ala. 512. This case is cited as ground for holding the administrator who held the money sued for in Jackson v. Stanley, 87 Ala. 270, an unnecessary party, but the soundness of that conclusion may well be doubted. Another reason given why the court can proceed without the dead fraudulent debtor's representative is that the fraudulent purchaser is in effect an executor de son tort. Hoffman v. Ellison, 51 Ala. 543. So if the estate of the deceased debtor has been decreed insolvent, it is apparent that his representative has no interest in the cause and need not be made a party. Merchants Nat. Bank v. MaGee, 108 Ala. 304; McClarin v. Anderson, 104 Ala. 201.

[4] In Wilkins v. Wilkins, 4 P. 245, the personal representative was a party, and the court held that he was a necessary party. But later the court in Inge v. Boardman, 2 Ala. 331, in considering a demurrer based upon the omission to make the personal representative a party defendant, referred to English authorities supporting both sides of the question, and held that he was not a necessary party, because the owner of the equity of redemption in many instances would be barred from going against the personal estate to relieve the mortgage, and in such cases the personal representative would have no interest in the litigation. Hence at least on demurrer the omission would not be fatal.

ceeds in a suit filed to foreclose the lien for the purchase money.[5] And a mere conduit through whom title passes, need not be joined with the party in interest in suits concerning the property;[6] and an assignee of a chose in action need not join his assignor;[7] the conception of our chancery court apparently being that the person really at interest is the party to be considered, whether he be plaintiff alone, or plaintiff in company with his assignor or trustee, or sue in the name of his assignor.[8] It must not be understood, however, that this conception is based upon Section 2489 of the Code of 1907, providing that the person really interested in a chose in action must be the plaintiff to sue upon it, for that section is held not to apply to suits in chancery.[9]

§ 118. Suits by trustees.—Another class of cases where all parties in interest need not be joined, is where trustees charged with the active management of trusts bring suits for the benefit of the trusts, or where trustees or assignees for the benefit of many beneficiaries or creditors, too numerous to be brought before the court, sue to foreclose mortgages or to collect claims due the trusts. In such cases the trustees may sue alone.[10] And of course the trustee may amend if he sees fit and join his cestui with him as a party

[5] McIntosh v. Reid, 45 Ala. 456.

[6] Sides v. Scharff, 93 Ala. 106. But when the conduit was a trustee who sold in breach of trust to another, that other cannot be sued without the trustee being made a party. Singleton v. Gayle, 8 P. 270.

[7] Jones v. Smith, 92 Ala. 455; Reese v. Bromberg, 88 Ala. 619

[8] Nicrosi v. Calera Co. 115 Ala. 429.

[9] Moore v. Pope, 97 Ala. 462.

[10] Walker v. Miller, 11 Ala. 1067; Swift v. Stebbins, 4 S. & P. 447. It would seem that the converse would also be law, and that a trustee who is not actually interested would not be a necessary party plaintiff. By statute in Alabama there are no dry trusts, and so the case of a dry trustee suing could not occur in name; but a mortgagee who assigns the debt, without in form assigning the mortgage, is held to be trustee of the legal title to the mortgaged land for the benefit of the security of his transferee; and he is a necessary party to the transferee's bill to foreclose the mortgage. Prout v. Hoge, 57 Ala. 28; Langley v. Andrews, 132 Ala. 147. But apparently he is thought to have an interest as endorser of the note, and so is not actually a dry trustee. Wilkinson v. May, 69 Ala. 33.

after the cause has begun.[11] So dormant partners are not necessary parties plaintiff to a suit on a firm claim.[12]

§ 119. Suits by judgment or contract creditors.—It is also held that one judgment creditor or one beneficiary interested in the administration of a trust, is sufficient in himself to sue to enforce it; and that while others similarly interested are proper coplaintiffs,[13] their omission can not be objected to as a defense to the suit.[14] But if the judgment creditor or joint beneficiary elects to sue alone, without naming his cobeneficiaries as parties with him, it would seem that he should at least leave the door open to them to join him later, and sue for himself and for such others similarly situated as may choose to come in and share the expenses of the suit.[15] At least, there is no case in which a joint beneficiary suing alone did not so frame his bill, even though the court did not refer to such a practice as being necessary.[16] As the judgment creditor has a lien on the debtor's property, and on that account may join other judgment creditors,[17] as being jointly interested with him in the property sought to be reached, it would seem improper for the court to dispose of the property upon the bill of one judgment creditor alone without giving other known lienors a hearing, or at least an opportunity to come in and be heard if they saw fit. Confirmatory of this reason, moreover, were the decisions which held that creditors whose claims had not been reduced to judgment, even though they had statutory power to file bills to set aside fraudulent conveyances of the debtor, must nevertheless file their bills separately, as they had no interest in the property in common.[18] This holding was later disapproved, however, on the ground that the statute which gave the simple contract creditor the right to file a suit in equity,

[11] Hitchcock v. U. S. Bank, 7 Ala. 388.

[12] Bank of St. Mary's v. St. John, 25 Ala. 566, 621.

[13] Bolman v. Overall, 80 Ala. 451; Brown v. Bates, 10 Ala. 432.

[14] Thornton v. Tison, 95 Ala. 589; Talladega Co. v. Jenifer Co. 102 Ala. 259.

[15] Brown v. Bates, 10 Ala. 432; 1 Daniell Ch. Pr. 291.

[16] Thornton v. Tison, 95 Ala. 589.

[17] See cases under note (10) supra.

[18] Montgy. & Fla. Ry. v. McKenzie, 85 Ala. 546; Reese v. Bromberg, 88 Ala. 619.

intended to give him all the rights that judgment creditors had; and so he can join other simple creditors as coplaintiffs if he sees fit.[19]

Since a simple contract creditor has no interest in the debtor's property, there appears no reason even in theory why he should not sue alone, without even giving an opportunity to other creditors to come in. And since the judgment creditor's suit is authorized by statute where the bill is filed after execution on the judgment has been returned unsatisfied (whether merely in confirmance of general equity jurisdiction or not),[20] it is no longer necessary for a judgment creditor suing under such circumstances to give an opportunity to other judgment creditors to come into the suit.[21]

§ 120. Suits by cestuis or legatees.—It was allowed in England under the old practice, and probably would be allowed in Alabama, that a cestui entitled to a certain aliquot part of a trust fund, might alone sue the trustee, just as a legatee entitled to a definite legacy, can sue the executor for it without making other legatees parties. The reason given in the Alabama decision in which the legatee sued the executor without joining the other legatees was the same as the reason why one cestui could sue alone under such circumstances in England, namely, that the other beneficiaries were not interested in the object of his suit.[22] In this light of course the other cestuis or legatees would be improper parties if joined. But in such cases the other cestuis or legatees, if they have not already collected their shares, are proper though not necessary parties to sue with him, on the principle of avoiding unnecessary similar suits.[23]

§ 121. Bills of peace.—This principle of avoiding many sim-

[19] Tower Mfg. Co. v. Thompson, 90 Ala. 129. It is probable that a simple contract creditor who wished to join all other known creditors, or sue in behalf of himself and all others who might wish to come in, might do so without the statute, on the theory of avoiding a multiplicity of suits. 1 Daniell Ch. Pr. 284.

[20] Code of 1907, § 3735.

[21] Talladega Mercantile Co. v. Jenifer Iron Co. 102 Ala. 259. Montgomery Iron Works v. Capital City Ins. Co. 137 Ala 134.

[22] Milsap v. Stanley, 50 Ala. 319; See § 117 supra; 1 Daniell Ch. Pr. 266, 293.

[23] 1 Daniell Ch. Pr. 284, et seq; Huckabee v. Swope, 20 Ala. 491.

ilar suits has long been made the basis for suing a great many defendants at once in order to cancel claims which they may have, even severally, to the plaintiff's property. Such bills are called bills of peace, and are not the same as the statutory bills to quiet title which can unite any number of persons within the purview of the statute.[24] Of course it may be said that the various defendants are all interested in the object of the suit. But they are merely interested that the plaintiff should not establish a title which would be paramount to them all; for their interest is not such that they could all unite in suing the plaintiff, nor generally even in suing each other. In Morgan v. Morgan,[25] the court held that a proper case was presented for a bill of peace, and in reviewing the circumstances said, "The prevention of litigation, under some circumstances, forms a subject for chancery jurisdiction. Where a person has a right, which various persons may controvert in different actions, to prevent a multiplicity of suits, equity will lend its aid and direct an issue to try the right. Let us enquire if the facts of this cause do not bring it within the operation of this rule. It is alleged in the bill that there are several lots levied on as the property of the defendant Morgan. Now each of these may be purchased by different persons, and complainants subjected to an action, at the suit of each purchaser, to try the title. In this point of view, the case is clearly within the principle on which chancery entertains bills of peace."

§ 122. Avoiding a multiplicity of suits.—But since the decision recently rendered by the Supreme Court of Alabama in the case of Southern Steel Co. v. Wiley Hopkins, et als.,[26] many persons can be sued in one bill to avoid a multiplicity of suits of the same general nature, whether property is directly involved or not; for that decision sustained a bill for an injunction against a great number of actions for personal injuries, on the ground that the plaintiff claimed a defense good against them all.

[24] Code of 1896, § 809 et seq. Code of 1907, § 5443, et seq.

[25] 3 Stewart, 383. And see Kennedy v. Kennedy, 2 Ala. 571, 609; Moses v. Mayor, etc., of Mobile, 52 Ala. 198.

[26] 47 So. Rep. 274, July, 1908.

§ 123. Generally all proper parties should be made parties.—It is believed, however, that apart from these cases last referred to, (which are rather consolidations of causes than examples of proper but unnecessary parties to one cause,) and the cases where the parties in interest are too numerous to be found and brought in, but are all capable of suing as plaintiffs, so that some can sue for the benefit of all who wish to come in, there are no cases where a person would be a proper party to the cause under Alabama decisions without being a necessary party to the cause under old English practice. So that in the absence of facts which put the person in question in the same situation as one who has been held unnecessary by some Alabama decision, the only safe practice is to make him a party. The rule of the English practice and the reason for it are thus stated by Daniell:—"It is required in all cases where a party comes to a court of equity to seek for that relief which the principles there acted upon entitle him to receive, that he should bring before the court all such parties as are necessary to enable it to do complete justice, and that he should so far bind the rights of all persons interested in the subject, as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter either at law or equity. For this purpose, formerly, it was necessary that he should bring regularly before the court, either as co-plaintiffs with himself, or as defendants, all persons, so circumstanced, that unless their rights were bound by the decree of the court they might have caused future molestation or inconvenience to the party against whom the relief was sought."[27]

§ 124. Rule stated by Supreme Court of Alabama.—Nor has the Supreme Court of Alamaba stated the principle less broadly. In Perkins et al. v. Brierfield Iron & Coal Co.[28] Clopton, J., said, "It is a general rule, that all persons who are legally or beneficially interested in the subject-matter of the suit, who have a legal or equitable estate, and whose rights are to be affected, or sought to be concluded by the decree

[27] 1 Daniell Ch. Pr. 241. [28] 77 Ala. 403.

are necessary parties to the bill." And in Mobile Land Improvement Co. v. Gass[29] Dowdell, J., said, "The general rule in a court of equity is that all persons having an interest in the subject-matter of the suit must be made parties, either as plaintiffs or defendants."

The principle is not difficult to grasp. Any persons whose vested rights in property are disposed of, or whose action must be taken into consideration in the carrying out of the decree, must necessarily be before the court, in order that they may be bound by it, or that others who are bound by the decree may not be interfered with in carrying it out. It is immaterial whether their interest is merely formal, if their action or non action could affect the value of the decree, they should be brought into court and their obedience commanded, rather than left out and their acquiescence relied upon.

§ 125. Dry trustees as parties.—The most difficult questions probably arise in connection with trust relations. It is true that our Alabama statute against dry trusts is broader than the English Statute of Uses, so that a purely dry trustee, holding only a legal title, cannot exist in Alabama;[30] and where the creation of such a trustee has been clearly attempted, it would be really improper to make him a party to suits in equity concerning the so-called trust property. But sometimes it is very difficult to tell when a trust is entirely dry. Since the decision in Jordan v. Phillips, in 1899,[31] if A by will leave vacant property to B in trust to mortgage and improve for the benefit of A's minor children, whenever in B's judgment the proper time has arrived, it may well be doubted whether the trust is valid, and whether B would be even a proper party to suits concerning the property. According to the reasoning in Jordan v. Phillips the trust is dry because the trustee has nothing to do at once; and so B has no title whatever. But nevertheless the doubtfully dry trustee should be made a party; because if he were omitted without objection being raised, and the case reached the Supreme Court on any other question, the absence may

[29] 129 Ala. 214.

[30] Code of 1907, § 3408; Code of 1896, § 1027.

[31] 126 Ala. 561.

there be raised for the first time, or even by the court ex mero motu, and the case be reversed for the omission, if the court think him not a dry trustee.[32] On the other hand, as a party, whether dry or not, nobody can object but him, as we shall see; and if the chancellor should order him stricken out, and the Supreme Court reverse the order, the chancellor may have him put in again by amendment, and comparatively little time would be lost.[33]

§ 126. The pleader should never allow doubt based on omission to arise.—But after all there are rarely a great number of persons whose relation to the suit is in doubt; so that the limit of proper parties is not as hard to set as it would seem. As quoted by Tyson, J., in a recent case:[34] "It is only persons who have a right or interest, legal or equitable, in the subject matter of the controversy which may be affected by the decree, who can be made parties to a suit in equity. Persons as to whom no decree can be rendered on a hearing, ought not to be made parties." So unless the retention of the doubtful parties would greatly delay the cause, as for instance where they are residents of Alabama, absent from the state, and as such not capable of being brought into court by publication for six months from the filing of the bill,[35] the pleader should not let their omission be a question in the cause.

§ 127. Exception: suits by minority stockholders.—There is one class of cases, however, where all the persons in interest are rarely necessary parties although the rule for the omission of some of them is difficult to state. It is the class of suits in which a dissenting minority stockholder complains against some action or non-action of the board of directors or of the majority of the stockholders of the corporation, and seeks to enforce his rights by injunction, or by a suit to charge the directors, or to enforce the corporate rights. While the basis of the plaintiff's suit in all such cases is his interest as a stockholder, and every stockholder is interested just as

[32] Hambrick v. Russell, 86 Ala. 199.

[33] Wilson v. Holt, 85 Ala. 95.

[34] Keith v. McCord, 140 Ala. 402, quoting from Jones v. Coldwell, 116 Ala. 367.

[35] Code of 1907, § 3104.

much as the plaintiff, at the same time no stockholder has either a legal or an equitable interest in the property of the corporation. The universal rule of practice therefore is to regard the consenting or conspiring stockholders as represented by the board of directors whose action they are supposed to ratify, and to make only the officers and the miscreant directors and the corporation itself parties defendant to the suit.[36] The reasoning by which the majority stockholders as individuals are omitted would seem to be the same as that for which cestuis may be omitted by creditors suing an active trustee for indebtedness incurred in administering a trust of which he has been given exclusive management; namely, that the management was entirely out of the cestuis' hands.[37]

§ 128. Other dissenting stockholders should be invited to join.—But the underlying principle upon which intra-corporate litigation can be instituted in chancery is that the stockholders of a corporation were regarded by the English chancellors as essentially partners, but on account of their number were not restricted by all the rules limiting the right of partners to bring their partnership affairs into court.[38] The plaintiff, however, if he sought the aid of the court in matters in which all the stockholders were interested as much as he, must either have them all in court or give them a chance to come in if they saw fit. Hence the English practice was to dismiss the bill on demurrer or plea, unless the plaintiff instituting such a suit described himself in the bill as suing on behalf of the other non-consenting stockholders as well as himself.[39] And undoubtedly this is the better practice in Alabama, although the Supreme Court has not passed upon it,[40] and such bills have been entertained at the suit

[36] Steiner v. Parsons, 103 Ala. 220; Mack v. Debardeleben C. & I. Co. 90 Ala. 396; Memphis & C. R. R. Co. v. Woods, 88 Ala. 631; Nathan v. Thompkins, 82 Ala. 437; Tutwiler v. Tuscaloosa Co. 89 Ala. 391; George v. Cent. R. R. Co. 101 Ala. 607; Decatur Co. v. Palmer, 113 Ala. 531; Bell v. Montgomery Co. 103 Ala. 275.

[37] Walker v. Miller, 11 Ala. 1067; State ex rel Sanche v. Webb, 97 Ala. 111.

[38] Wallworth v. Holt, 4 M. & C. 635; Foss v. Harbottle, 2 Hare, 491 (English.)

[39] 1 Dan. Ch. Pr. 291.

[40] In George v. Cent. R. R. Co.

of a single stockholder or several stockholders who did not give invitation to others to join them.[41] And in the absence of such an invitation other stockholders seem to be regarded as strangers to the suit who can come in only on an intervening bill.[42]

§ 129. When invitation to other stockholders improper.— When the plaintiff's grievance is that the directors fail or refuse to enforce some right of the corporation, and the right is one which the corporation as an entity holds or can sue for if the persons in control will do so, the plaintiff cannot maintain his bill to enforce the right of the corporation unless he alleges that he has used due diligence to procure the officers and directors to pursue the matter, and that they have refused; and if opportunity for action by the stockholders in meeting assembled has occurred, he must allege that he has appealed to them, and that they have refused also.[43] And in such a case, as it would be impossible for other stockholders to join in the bill who had not prepared themselves by making such a request of the corporate authorities, it would be idle to give all stockholders an invitation to do so; and the omission would be correct.[44] But if the action or non-action of the corporate authorities was due to their being controlled by outsiders, or if for any clearly averred reason the request of them to do their duty would have been idle, the plaintiff's suit will be entertained without an application to the corporate authorities; and in such cases it would seem that the invitation to other stockholders to join the plaintiff should be inserted in the bill. But suits seem to

101 Ala. 607, and in Steiner v. Parsons, 103 Ala. 220, the bill described the plaintiff as suing in behalf of himself and all other stockholders who might desire to come in.

[41] Nathan v. Thompkins, 82 Ala. 437; M. & C. R. R. v. Woods, 88 Ala. 631.

[42] Talladega Co. v. Jenifer Co. 102 Ala. 259; Ex parte Printup, 87 Ala. 148.

[43] Tutwiler v. Tuscaloosa Co. 89 Ala. 391; Mack v. Debardeleben Co. 90 Ala. 396; Bell v. Montgomery Co. 103 Ala. 275; Decatur Co. v. Palmer, 113 Ala. 531.

[44] In the cases in note (43) such a demand was held necessary and the bills were filed in the name of the plaintiff alone.

have been entertained with and without the invitation indiscriminately.[45]

§ 130. Rule where parties in interest are many.—By the English practice when one of many persons in interest, such as the complaining stockholder above referred to, filed his suit without bringing all similarly interested before the court, but described himself as suing in their behalf as well as his own, and gave them in his bill the invitation to come into the suit as plaintiffs with him if they should see fit to do so, the decree was as binding on the equities of absent parties as it was on the equities of the plaintiff.[46] And this practice has been enacted into a rule of practice in Alabama.[47] The wording of our rule, however, leaves the question of proceeding in the cause without the absent parties in interest to the discretion of the chancellor, and says nothing about its being necessary for the plaintiff to describe himself as suing for their benefit as well as his own. And since the decisions on this rule do not indicate that the chancellor need express his discretion in any more distinct way than by proceeding without noticing the omission of the absent parties,[48] the cases cited above showing that the bills of single dissenting stockholders were entertained without invitation to others, may be decisions that such invitations need not be given.[49]

It will be noted, however, that in the absence of the invitation in the bill, or an order of court expressly obtained, there is nothing to tell whether absent parties were intended to be bound, or whether their omission was merely overlooked by the court, the defendant not having chosen to demur to the bill for want of parties.

§ 131. Rule where the many in interest are defendants.—Alabama Chancery Rule 19 allows the cause to proceed with-

[45] M. & C. R. R. v. Woods, 88 Ala. 631; Steiner v. Parsons, 103 Ala. 220; Bell v. Montgomery Co. 103 Ala. 275.

[46] 1 Daniell Ch. Pr. 288, 291, et seq.

[47] Chancery Rule 19, Code of 1907.

[48] Morton & Bliss v. N. O. & S. Ry. Co. 79 Ala. 610; The State ex rel Sanche v. Webb, 97 Ala. 111; Lebeck v. Ft. Payne Bank, 115 Ala. 447; Noble v. Gadsden Co. 133 Ala. 250.

[49] But see wording of opinion of Head J. in Lebeck v. Ft. Payne Bank, 115 Ala. 454.

out all of a great number of parties in interest where they are defendants as well as where they are plaintiffs, provided the parties present represent all the adverse interests of plaintiff and defendant. And this was the English practice too.[50] The reason of the rule was not only that to require a great number of absent parties to be found or accounted for would often defeat justice by making a suit impracticable, but that the absent defendants if hurt by the decree had a claim over against those who might profit by their absence, which they could enforce more easily than the plaintiff could sue a great number.[51]

§ 132. Chancery Rule 19 construed.—The wording of Alabama Chancery Rule 19 is somewhat misleading in stipulating that in cases where absent parties are dispensed with under its provisions, "the decree shall be without prejudice to the rights and claims of the absent parties." But this is held by our decisions not to mean that the absent parties can bring suits later without regard to the decree, but merely that they shall not be deprived of the right of coming in under it and obtaining its benefits.[52]

§ 133. Chancery Rule 18 construed.—The same interpretation will probably be given to similar wording in Alabama Chancery Rule 18, which is as yet uninterpreted by the Supreme Court. And Rule 18 in this light becomes a very important rule in speeding a cause by dispensing with non-resident defendants. "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, reside out of the jurisdiction of the court, or are insolvent, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases, the decree shall be without prejudice to the rights of the absent parties."

The facts in the case of Noble v. Gadsden Land & Improvement Co.[53] justified the decision under this rule that non-resident stockholders may be omitted in a suit to dissolve the

[50] 1 Daniell Ch. Pr. 303, 319, 320, 322.

[51] 1 Daniell Ch. Pr. 321.

[52] Morton v. N. O. & S. Ry. Co. 79 Ala. 610; Noble v. Gadsden Co. 133 Ala. 250.

[53] 133 Ala. 250.

corporation; but the decision sustaining their omission was rested upon Rule 19, since they were very numerous and their interest was already represented. But it will be noted that Rule 18 justifies their omission if non-resident or insolvent, even though not already represented by others present, and although the parties are not too numerous to be brought in. So its importance in the administration of estates and in trusts cannot be over estimated. And it must be read into every decision of the court holding that all heirs and distributees and all joint owners must be before the court before distribution can be made, or sales for division ordered.

But of course the omission of parties in interest cannot be justified by their insolvency or their being beyond the jurisdiction unless such facts appear by appropriate averments in the bill.[54]

§ 134. Suits against stockholders of dissolved corporations involving liability.—It was held that a suit could not be maintained against stockholders of a practically dissolved corporation to subject them to their constitutional liability for the amount of their stock imposed upon them by section 3 of Article XIII of the Constitution of 1868, (now abolished) unless all the other stockholders were before the court.[55] And as there is no logical difference between suits on that extra liability of stockholders and suits on their general liability for uncalled percentages of their stock subscriptions, it is probable that in the latter suits likewise all stockholders must be made parties to the record; unless non-resident and insolvent stockholders constitute exceptions, based upon the interpretation of Chancery Rule 18, given in the last paragraph. But the reason for which all the stockholders were held necessary parties to suits to enforce their constitutional liability, was that the liability might be thereby mutually adjusted between them; and it must be noted that this is directly contradictory to the reason given for the English rule by which some of many defendants could be omitted, the rule upon which the justice of our Rule 19 above discussed must rest, namely, that the stockholders who might have to pay more

[54] Dictum in Friend v. Powers, 93 Ala. 114.

[55] Friend v. Powers, 93 Ala. 114.

than their share, by reason of the absence of others, ought rather to be inconvenienced than that the company's creditors be required to accomplish the difficult task of bringing all the stockholders into court.[56]

§ 135. Certain peculiar decisions.—There are certain other instances of parties necessary to a suit under the general rules stated above, but held unnecessary in Alabama by decisions the usefulness of which to a pleader is more important than their soundness. So before entering upon the application of the rule given above for determining necessary parties, it would not be amiss to cite specially some of the cases holding certain persons unnecessary parties to the suits considered, and certain cases in which the making of particular persons parties was held to be even improper.

The heirs of a deceased husband are improper parties defendant to a bill brought by the widow for mesne profits upon her dower interest, which had been collected by the administrator of the husband together with other rents of the real estate. This was decided in Boyd v. Hunter,[57] and was thought to be supported by the earlier case of McLaughlin v. Goodwin.[58]

Again a debtor who has made an assignment for the benefit of his creditors is not a necessary party to a suit by the creditors against the trustee and the sureties on his bond to enforce the performance of the trust, provided the bill alleges that the debtor is insolvent.[59] But in a suit by a vendor to foreclose his lien the vendee's administrator, even when the estate of the vendee has been decreed insolvent in the statutory method, is a necessary party.[60] And a mortgagee who has bought the equity of redemption must make the administrator of the insolvent estate a party to a bill to quiet title against the mortgagor's heirs; so that he may have a chance to contest the fairness of the price.[61]

[56] 1 Daniell Ch. Pr. 321.

[57] 44 Ala. 705.

[58] 23 Ala. 846.

[59] Andrews v. Ford, 106 Ala. 173. This decision is not rested on Chancery Rule 18, allowing the omission of insolvent parties, but on the ground that the debtor has no real interest.

[60] Moore v. Alexander, 81 Ala. 509.

[61] Hitchcock v. U. S. Bank, 7 Ala. 386.

§ 136. Certain peculiar decisions (continued).—In Anniston Carriage Works v. Ward[62] it appears to be held that a second mortgagee need not be made a party to a creditor's bill to declare the first mortgage a general assignment for the benefit of the creditors; but on careful examination of that decision it will appear that the second mortgage was not intended to be foreclosed; and in that light of course the second mortgagee was not a necessary party.[63]

On the theory that merely formal parties may be omitted, it is held unnecessary in Alabama to make a vendor of property, either real or personal, who has transferred his entire interest to the plaintiff a party defendant to a bill against a prior holder, such as a bill to redeem from a mortgage, or a bill to foreclose a lien.[64] And on a suit to establish a constructive or resulting trust, the vendor has been held an unnecessary, even an improper party.[65] So an assignee of a claim or chose in action may sue in equity concerning it without bringing in his assignor; and that even though the assigment were by parole only.[66]

On the same principle, that merely formal parties should be omitted, the heirs or next of kin of a decedent whose estate owes no debts, may sue on choses in action of the estate without an administration and a formal administrator as a party.[67] And a bill for partition of the lands of such an estate without debts does not require an administrator to be appointed as a party.[68] Nor is the administrator of such an estate a necessary party to a bill by the transferee of a purchase money note in a suit to foreclose the vendor's lien securing the note, although the heirs must be made parties.[69]

[62] 101 Ala. 670.

[63] Walker v. Bank of Mobile, 6 Ala. 452; Cullom v. Batre, 2 Ala. 415.

[64] Thomas v. Jones, 84 Ala. 302; Bogan v. Hamilton, 90 Ala. 454.

[65] Vanderford v. Stovall, 117 Ala. 344.

[66] Jones v. Smith, 92 Ala. 455; Reese v. Bromberg, 88 Ala. 619. These are not overruled by Langley v. Andrews, 132 Ala. 147, because the mortgagee in that case had not assigned the security with the note. See § 118, supra. and notes.

[67] McGhee v. Alexander, 104 Ala. 120; Wright v. Robinson, 94 Ala. 479; Cooper v. Davidson, 86 Ala. 367.

[68] Marshall v. Marshall, 86 Ala. 383.

[69] Knight v. Knight, 103 Ala. 484.

§ 137. Certain peculiar decisions (continued).—It has also been held that a naked bailee of property brought into litigation is not a necessary party to the bill,[70] although it does not seem to have occurred to the court that another suit would have been necessary had the bailee refused to respect the decision in the cause.

So with more reason it has been held that a sheriff is not a proper party to a suit to enjoin the collection of a judgment, because the injunction to the owner of the judgment is as binding on the sheriff after notice as it would be if directed to him.[71]

§ 138. Peculiar decisions should not be followed by pleader.—Some cases seem to be singular in not requiring certain persons, apparently interested, to be made parties; but upon analysis they turn out to be merely decisions upon the question of substantive law whether such persons have an interest or not; and so are unquestionably correct from the standpoint of practice. Thus the decision in Grider v. Am. Freehold Land Mortgage Co.[72] is merely that a wife has no legal or equitable interest in the homestead of her husband so long as he is alive; and so of course should not sue with him to cancel a mortgage upon it, even though the only defect in the mortgage was the want of her signature. It is best therefore not to rely upon a peculiar decision in drawing a bill, for when its danger is brought to the attention of the Supreme Court, they may be expected to distinguish it as a decision upon substance rather than upon practice, if the facts are broad enough to admit of their so doing.

Let us now consider some of the established applications of the principle stated above for determining the necessary parties to a suit, remembering, however, that each proposition must be understood as qualified by Rules 18 and 19 of Alabama Chancery Practice, which relieve from the necessity of bringing in non-resident and insolvent persons and those too numerous to be found.

[70] Abraham v. Hall, 59 Ala. 386. But see semble contra, Cartwright v. Bamberger, 90 Ala. 405.

[71] Collier v. Falk, 61 Ala 105; Pate v. Hinson, 104 Ala. 599.

[72] 99 Ala. 281.

§ 139. General Rule I.—All persons holding the legal title to the subject matter of the litigation must be made parties to the bill.—The person holding merely an equitable interest cannot sue alone to assert it against others than the trustee who deny his rights, for the reason, as pointed out by Daniell, that the legal right would not be bound by the decree, and the trustee or holder of the legal title might annoy the defendant by another action on the same cause.[73] Thus a mortgagee who has assigned the chose in action, but not the mortgage, is a necessary party to a bill by the transferee to foreclose the mortgage.[74] And the vendor of property who has transferred a purchase money note is a necessary party to a suit on the note to foreclose the vendor's lien.[75] And the grantee of land held adversely by a third party cannot file a bill in his own name against the third party to enforce rights which the grantor might enforce.[76] And for the same reason the assignee of a chose in action or of a judgment could not sue on it in English practice without joining the assignor; but as we have seen, in Alabama he may sue without making his assignor a party.[77] He may, however, sue in his assignor's name, although he will still be subject to all defenses which could be set up against a suit in his own name.[78]

A cestui que trust cannot sue in equity upon matters connected with the trust without making the trustee a party.[79]

[73] 1 Daniell Ch. Pr. 241.

[74] Prout v. Hoge, 57 Ala. 28; Langley v. Andrews, 132 Ala. 147.

[75] Broughton v. McDonald, 64 Ala. 210; Davis v. Smith, 88 Ala. 596; Knight v. Knight, 103 Ala. 484.

[76] Franklin v. Pollard Milling Co., 88 Ala. 318; Pearson v. King, 99 Ala. 125. It was held in the latter case that the assignment was void for the common law reason that the land was held adversely, and also for the reason that the grantor could sue, and the defendant could not set up the assignment in bar of his suit. It was also held that the attempted assignment authorized the grantee to sue in the name of the grantor. Hence no doubt the grantee by joining his grantor as a party with him could sue in equity.

[77] 1 Daniel Ch. Pr. 250, et seq., Jones v. Smith, 92 Ala. 455; Reese v. Bromberg, 88 Ala. 619.

[78] Nicrosi v. Calera Land Co., 115 Ala. 429.

[79] Hambrick v. Russell, 86 Ala. 199; MuCulley v. Chapman, 58 Ala. 325; Kimball v. Greig, 47 Ala. 230; McKinley v. Irvine, 13 Ala. 682.

And as the trust must be an active trust in Alabama, the cestui cannot take the initiative in the suit without alleging that he has requested the trustee to bring suit and that the trustee has refused.[80]

§ 140. General Rule II.—The entire title to the subject matter of the suit should be brought before the court.—Thus all joint owners, next of kin, or heirs are necessary parties to a suit to divide or distribute the property in which they are all interested.[81] If one joint tenant or tenant in common files a bill to sell the property for division, all the other joint tenants or tenants in common must be made parties to the bill.[82] And in bills to compel the administration of an estate, or to settle an estate, all the heirs and next of kin are necessary parties.[83] And the requirement is not limited to those who have estates in possession; for those having estates in remainder, or having interests in personal property to arise after the death of those in present enjoyment of it, must also be joined in suits affecting the property.[84] So where there are more than one representative of an estate, they must all be made parties to suits affecting the estate, since the common law esteemed the several executors or administrators as but one person representing the deceased.[85] But if not all the executors named in the bill qualify, of course only those who qualify need be made parties.[86]

§ 141. Exception, where an interest cannot be affected by the suit.—It is true as a general rule that the whole title must be brought before the court; but there are cases where certain claims upon the title need not be represented, for the reason that those interests are not affected by the suit. The bill sometimes shows on its face that it does not affect them. Thus a bill by a junior mortgagee to foreclose his mortgage

[80] Bailey v. Selden, 112 Ala. 593; Blackburn v. Fitzgerald, 130 Ala. 588.

[81] Ramey v. Green, 18 Ala. 771; Gould v. Hayes, 19 Ala. 438; Teague v. Corbitt, 57 Ala. 529; Parker v. Parker, 99 Ala. 239.

[82] Foster v. Ballentine, 126 Ala. 393.

[83] Gould v. Hayes, 19 Ala. 438, 457; Parker v. Parker, 99 Ala. 239.

[84] Ramey v. Green, 18 Ala. 771; Sanders v. Godley, 23 Ala. 473.

[85] Clements v. Kellogg, 1 Ala. 330.

[86] 1 Daniell Ch. Pr. 273.

should not make the holder of a prior recorded mortgage a party, because the suit could not in any way affect the validity of the prior mortgage.[87] And sometimes a situation is presented on the facts where parties having clear interests cannot in law be affected by the suit. Thus in a suit for sale of property for division it may not be possible to remove the lien of a mortgage on one share securing an indebtedness not yet due, unless the mortgagee elects to consent to the foreclosure of his lien.[88]

§ 142. General Rule III.—In actions by a trustee or fiduciary, the cestuis or beneficiaries should be made parties to the bill.[89]—This is to bind them by the decree of the court; and is for the protection of the trustee or fiduciary on the one part, and for the protection of any debtor to the trust who might pay money into court.

So an administrator or executor,—who is but a sort of legal trustee of the personal property of the estate,[90]—if he has occasion to bring the administration of the estate into chancery, or seeks the advice of the chancery court, must make all the next of kin or legatees parties to his bill.[91] And where the estate has been decreed insolvent under the statute governing insolvent estates, and the creditors have filed their claims in court, the administrator should make the creditors parties too.[92]

[87] Bolling v. Pace, 99 Ala. 611.

[88] Espalla v. Touart, 96 Ala. 139. But cf. Mylin v. King, 139 Ala. 319, citing Inman v. Prout, 90 Ala. 362.

[89] See 1 Daniell Ch. Pr. 267, et seq.; Stone v. Hale, 17 Ala. 557; Walker v. Miller, 11 Ala. 1067. Apparently no case appears in the Alabama reports of a trustee seeking the advice of a court of chancery upon the trust duties in which the question of parties was presented.

[90] Leavins v. Butler, 8 P. 380, 397.

[91] While the decisions in Alabama are very numerous explaining when and why the administrator or executor should ask the aid of a court of chancery upon the administration of the estate, it seems that none of them has gone on to say that he must have all parties before the court. The cases cited in note (73), however, are broad enough to show that the next of kin or heirs must be brought before the court in all suits to settle the estate whether brought by the executor or the next of kin or heirs.

[92] McCulley v. Chapman, 58 Ala. 325.

§ 143. Right of trustees to give releases and its effect upon the rule.—The custom was common in England for the creator of a trust to avoid the necessity for the trustee to bring the cestuis que trustent into suits to enforce sales or contracts made by him in his capacity of trustee, by inserting in the deed or will creating the trust a power to the trustee to give receipts. Thus the decree of the court against a trustee who had power to give a receipt rendered it immaterial to the vendee or debtor what the trustee might do with the money. This power to give releases has been granted to the trustee by law in Alabama by section 3411 of the Code of 1907,[93] providing that "in all cases in which a payment has been or may be made to a trustee authorized to receive the same, the person making such payment is not responsible for its application according to the trusts; nor can any right or title derived from such trustee in consideration of such payment, be impeached on account of any misapplication of the same, unless it be made to appear that the person making such payment colluded with the trustee, or knew of his intention to waste or mismanage the funds." But it would not be safe to rely upon this section of the Code as equivalent to the express authority to make releases inserted in the English trust deeds, and on that account to leave the cestuis que trustent out of a suit against the trustee to enforce his contract of sale.

If the deed of trust gives the trustee absolute control of the trust property, however, the beneficiaries need not be parties to his suits; and creditors of the estate can sue the trustee without bringing in the beneficiaries.[94]

And for the reason that executors and administrators were by the early law the actual representatives of the dead man, and have always been held to own the personal property of the decedent, so as to give releases with respect to it,[95] they can sue in equity in matters concerning the personal estate without making the legatees or next of kin parties to the suit.[96]

[93] Code of 1896, § 1039; Durr v. Wilson, 116 Ala. 125.

[94] Walker v. Miller, 11 Ala. 1067.

[95] Steele v. Steele, 64 Ala. 438, 455.

[96] Blackburn v. Fitzgerald, 130 Ala. 584; 1 Daniell Ch. Pr. 270.

It may be noted also that in suits between co-trustees, where the interest of the cestuis que trustent is merely collateral, as where one trustee has disregarded the rights of the other trustee to share possession of the property, or where the one trustee has induced the other to make a transfer of the property into the name of the one only, the beneficiaries need not be brought into the dispute.[97]

§ 144. General Rule IV.—In suits upon obligations all obligors should be parties, whether primarily or secondarily liable.—It is provided by statute in Alabama that all obligations of two or more persons shall be considered several as well as joint obligations;[98] and the decisions have held that partnership obligations are within the statute.[99] It is also especially provided as to chancery suits, that when the plaintiff has a joint demand, he may proceed against one or more of the parties thereto, without joining the others.[1] So it is unnecessary to make any principal obligors parties defendant merely because the obligation was drawn as joint.

But such principal obligors as the plaintiff desires to hold he should make parties, because although he is at liberty to sue one, all, or any number of them less than all,[2] the whole obligation probably merges by Alabama decisions into the judgment, and the plaintiff probably could not bring another suit on the obligations against the omitted principal obligors.[3]

It is true, however, that if the obligation was a partnership obligation, and the suit was brought against the partnership in its firm name, under section 2506 of the Code of 1907,[4] and judgment obtained, suit might be brought again upon the judgment as a new right against the several partners; because each partner is liable for the debts of the partnership, and a judgment is a form of debt.[5] But since a judgment obtained

[97] 1 Daniell Ch. Pr. 276. And compare the language of the court in Blackburn v. Fitzgerald, 130 Ala. 584.

[98] Code of 1907, § 2503; Code of 1896, § 39.

[99] Haralson v. Campbell, 63 Ala. 278.

[1] Code of 1907, § 3089.

[2] McKee v. Griffin, 60 Ala. 427; Code of 1907, § 2506.

[3] Brown v. Foster, 4 Ala 282; Cox v. Harris, 48 Ala. 538.

[4] Code of 1896, § 40.

[5] Cox v. Harris, 48 Ala. 538.

upon a joint obligation may be enforced against the individual property of either of the joint debtors, in ordinary cases all the principal obligors should be made parties. The only value of the law making joint obligations several as well as joint lies in the oportunity given thereby of suing one obligor alone when the other cannot be found, and in the sometimes important right to sue the person who certainly made the obligation, when there might be a difficulty in proving that the obligation had been made by all.

§ 145. General Rule IV. (continued).—Of course the principal obligors in instruments where the suretyship is open or express, that is, obligations which stipulate that certain of the obligors are principals, and others are sureties, cannot object if the plaintiff sues them first and disregards the existence of the sureties until he finds it necessary to sue them;[6] for the judgment being conclusive against the principals, "the rule is that it is equally so against the securities, who, in the absence of fraud, cannot litigate any questions except those which may arise upon the factum of the bond or its legal sufficiency."[7]

It was the old practice, however, that the sureties in such open suretyship obligations could object if they were sued and the principal obligors omitted, first, because the sureties are entitled to the presence of the principals at the taking of the account of what remains due on the obligation, and secondly, because the sureties are entitled to recoup against their principals, and should be allowed to do so in the same action in which they are held liable.[8] But if the principal obligor is alleged in the bill to be insolvent, or is dead in another state and no administrator has been appointed for him, these facts would constitute a sufficient excuse for his omission.[9] If the non-resident principal obligor died leaving property in this State, however, it is probable that the plaintiff should have an administrator appointed, and make him a party also.

[6] 1 Daniell Ch. Pr. 316.

[7] Watts v. Gayle, 20 Ala. 817, 825.

[8] Moore v. Armstrong, 9 P. 697, 707; Story Eq. Pl. § 169.

[9] Moore v. Armstrong, 9 P. 697; Frierson v. Travis, 39 Ala. 150; Fulgham v. Herstein, 77 Ala. 496.

§ 146. General Rule IV. (continued).—Since the statute above cited, making all joint obligations separate obligations also, it is said that the plaintiff may sue the sureties without suing the principals, and without giving any excuse.[10] But the opinion in which it is stated was rendered upon a bill alleging the good excuse of the absence and insolvency of the principal, facts which were fully noted by the court as justifying the omission; so the opinion is hardly sufficient authority to sue a surety alone in equity when the principal is solvent and within reach.

It has been held that a bill may be filed against an endorser of a negotiable note to set aside a fraudulent transfer of his property, without making the makers parties.[11] But this decision was based upon the indorser's contract under the commercial law.

As the sureties merely undertake to pay the obligation if the principal does not, and have the right to equalize among each other the loss they may sustain, it would seem that any of them sued alone might object if all other resident solvent co-sureties are not made parties; otherwise circuity of actions might be occasioned. But it was decided in Teague v. Corbitt,[12] that under the statute making joint obligations separate, one surety may be sued without the others; and while the decision is perhaps hasty in the light of the fact that the other sureties were said to have been out of the jurisdiction, it is an old decision and will be followed.

§ 147. General Rule IV. (continued).—The universal practice is to sue all the sureties in the same bill with the principal obligor, in the absence of some good reason for not doing so;[13] and the effort of the plaintiff usually is to extend rather than to restrict the number from whom he seeks relief. Thus in Lott v. Mobile,[14] the plaintiff was allowed to join in its suit sureties on two different bonds, by alleging that the principal, the city tax collector, kept but one running account.

[10] Fulgham v. Herstein, 77 Ala. 496.

[11] McGhee v. Importers & Traders Bank, 93 Ala. 192.

[12] 57 Ala. 529; followed in Lott v. Mobile County, 79 Ala. 69.

[13] Moore v. Armstrong, 9 P. 697; Watts v. Gayle, 20 Ala. 817; Gerald v. Miller, 21 Ala. 433.

[14] 79 Ala. 69.

And undoubtedly the practice of bringing in all the parties possible as defendants is to be recommended, since as we shall see, their presence is ground for objection by no one but themselves.

§ 148. General Rule V.—In suits to foreclose mortgages or liens, all those claiming under the lien, or claiming an interest in the property subject to the lien, should be made parties to the suit.[15]—The reason of this rule is that any person who has a second mortgage or a judgment lien upon the property subsequent to the mortgage or lien sought to be foreclosed, has the same interest in the suit that the mortgagor has; and therefore has the right to pay the lien to be foreclosed and step into the plaintiff's rights; or if he believes the plaintiff's claim fraudulent, he has the right to come into court and contest it and resist the foreclosure. The right extends to all sorts of junior claimants from the assignee of the entire equity of redemption of the mortgagor down; provided of course the claimant has not himself parted entirely with his interest; for mesne purchasers from the mortgagor have no interest and need not be made parties.[16]

The making the junior encumbrancer a party is not a necessity to the foreclosure of the lien as against the mortgagor.[17] But failing to make him a party leaves his rights unaffected.[18] He still has his right to pay the prior claim upon the property and step into the prior claimant's place.[19]

§ 149. Chancery Rules applicable to mortgage suits.—With reference to the method and time of making junior encumbrancers parties defendant, however, two convenient rules of practice may be noted. In the rural counties in which no abstract companies exist, it is very laborious to search the mortgage records to learn the exact nature of the junior encumbrances. Chancery Rule 106 of the Code of 1907 greatly obviates this labor by providing that "in mortgage suits it shall be sufficient to bring in subsequent encumbrancers to

[15] Bolling v. Pace, 99 Ala. 607; Hambrick v. Russell, 86 Ala. 199.

[16] Merritt v. Phenix, 48 Ala. 87.

[17] Forrest v. Luddington, 68 Ala. 1.

[18] Cullom v. Batre, 2 Ala. 15.

[19] Powers v. Andrews, 84 Ala. 289, 293; Mims v. Cobbs, 110 Ala. 577.

state that they claim some interest in the subject of the bill, and pray for a summons to them to answer." The court can then decree a sale without declaring the priorities between such claimants until the proceeds are in the hands of the court, if no necessity for doing so earlier appears in the proceedings. The same rule provides further that any omitted encumbrancers may come in voluntarily at the distribution and on petition obtain their shares. The rule is probably merely declaritory in this, however.[20]

The other rule is number 107 of Chancery Rules, Code of 1907, which provides that the plaintiff may call in junior encumbrancers or other parties in interest discovered after filing the bill, at any time before confirmation of the foreclosure sale; and unless they make opposition by answer, their claims will be foreclosed without a resale. Both these rules have been enacted many years, but they seem to have been little made use of.

§ 150. All persons interested should be parties.—The above general rules, it is believed, comprehend most of the instances of necessary parties to the suit; but let the student distinctly understand that these rules are drawn only for convenience in determining who must be parties, not who must not be parties to the suit. There are probably many instances of necessary parties not embraced by the rules; so that the only absolutely safe guide for the inexperienced pleader is the language of Justice Clopton, already quoted: "It is a general rule that all persons who are legally or beneficially interested in the subject matter of the suit, who have a legal or equitable estate, and whose rights are to be affected or sought to be concluded by the decree are necessary parties to the bill."[21]

[20] See § 164, post.

[21] Perkins v. Brierfield I. & C. Co. 77 Ala. 403.

CHAPTER V.

Of the Parties to a Suit.—(Continued.)

What Parties Must be Plaintiffs and What Parties Must be Defendants Respectively.

§ 151. Principal parties generally apparent.—No instruction would seem necessary upon the fundamental proposition that the person who is sufficiently aggrieved to desire the relief of a court of chancery must be a plaintiff in any proceeding he may institute. And it is equally clear that the person who is committing the chief aggression, and who refuses to make amends, must be a party defendant. These two principles seem easy enough to grasp; and yet in the case of Stone v. Hale,[1] a suit brought before the abolition of dry trusts in Alabama, a married woman who desired the reformation of the deed of trust creating her separate estate, brought the suit in the name of her dry trustee, and suffered a dismissal because she herself was not the party plaintiff. And again in Elliott v. Sibley,[2] a stockholder who desired to enjoin a corporation from selling certain shares of the stock belonging to the plaintiff, omitted to sue the corporation entirely, and sought merely to enjoin the president from making the sale. As tersely generalized therefore by Mr. Justice Mayfield in his Alabama Digest,[3] "If the only party defendant is a mere formal party, the court will not proceed."

§ 152. Usually unimportant how collateral interests are presented.—But although a blunder as to who should be the principal plaintiff, or who should be the principal defendant, is quite rare, the student is not infrequently at a loss to select among the many other persons incidentally necessary parties to his suit whom to join with him as plaintiffs and whom to summon as defendants to his bill.

As a general rule it makes no difference to the validity

[1] 17 Ala. 557.
[2] 101 Ala. 344.
[3] V. 3, 249.

of a decree determining the rights of parties before the court whether they are present as plaintiffs or as defendants; so it is sufficient if all parties interested in the subject of the suit, besides the chief plaintiff and the chief defendant, are before the court, without regard to which capacity they come in.[4] Thus although a tenant in common of land should ordinarily sue with his co-tenant in a bill to restrain misuse of the property; if out of the state he may be made a defendant, so that the plaintiff may proceed without awaiting his return.[5] And co-administrators or executors and co-assignees are sufficiently before the court to comply with the law requiring all the representatives to act for the estate, when some are plaintiffs and some are defendants to the suit.[6] And in Stone v. Hale, just referred to above, the court in pointing out that the beneficiary and not the dry trustee must sue to reform the trust deed, said that the trustee, though a necessary party, might be made either a party plaintiff or a party defendant. So in suits by heirs or distributees to administer or settle estates, some of the heirs or distributees are made plaintiffs, and the remainder of them are made defendants.[7] And in a suit by the administrator to foreclose a mortgage it is immaterial whether the heir of the mortgagee is a co-plaintiff or a co-defendant to the suit.[8]

§ 153. Those entitled to the same relief should join as plaintiffs.—But while the plaintiff can obtain a decree and will be perfectly secure in his rights under his decree against all others interested in the subject matter, by whatever way they come into court, it is often important to the principal mover of the suit, for other reasons than the mere soundness of his decree, how he classifies the other parties. There may be many of them whose interests are similar to his, and who will be entitled to the same relief against the principal defendant which he seeks. Such persons therefore are naturally and properly made parties plaintiff with him, in order

[4] 1 Daniell Ch. Pr. 273; Parkman v. Aicardi, 34 Ala. 393.

[5] Parkman v. Aicardi, 34 Ala. 393; Davis v. Vandiver & Co., 143 Ala. 202.

[6] 1 Daniell Ch. Pr. 273.

[7] Marshall v. Marshall, 86 Ala. 383; Jackson v. Rowell, 87 Ala. 685.

[8] Huggins v. Hall, 10 Ala. 283.

that they may assist him in establishing his bill, or may defray the expenses with him if he loses. Suits by heirs and next of kin against administrators and executors to wind up the estates of deceased ancestors are examples in point.[9] Other examples are the suits already referred to[10] in which the persons interested are very numerous and the plaintiff files his bill for his own benefit and for the benefit of any other persons similarly interested who may choose to come in and join in the expenses of the suit. Another class of cases involving persons whose interests are similar and who may be joined as plaintiffs, will be recognized in suits by judgment creditors to set aside fraudulent transfers;[11] and especially statutory creditors' bills by creditors who have no lien, but seek to subject the property of the debtor which they may be able to find to the payment of their claims.[12] All these suits may entail great labor and expense, and the prudent plaintiff will desire his counsel to obtain for him not only his rights, but the chance to distribute among as many others as possible the burden of paying the costs of court in case the suit is lost.

§ 154. All the plaintiffs must be entitled to relief.—But there is a limitation upon the value to the plaintiff of joining as co-plaintiffs with him all similarly interested or apparently entiled to the same relief. At common law when two or more persons joined in an action, they had to prove a joint claim, and if any one of them turned out not to have a share in the claim, the suit was lost, because the allegata and probata did not correspond. That is to say, there was a variance.[13] And this has always been the rule in equity too.[14] And a defense such as the statute of limitations, good against one plaintiff upon a joint claim, is a good defense to the entire

[9] Tygh v. Dolan, 95 Ala. 269; Bragg v. Beers, 71 Ala. 151; Bromberg v. Bates, 98 Ala. 621, same case, 112 Ala. 362; Baker v. Mitchell, 109 Ala. 490.

[10] George v. Cent. R. R. Co., 101 Ala. 607; Steiner v. Parsons, 103 Ala. 220. See §§ 127-130, ante.

[11] Bolman v. Overall, 80 Ala. 451; Brown v. Bates, 10 Ala. 432.

[12] Tower Mfg. Co. v. Thompson, 90 Ala. 129.

[13] Cottingham v. Armour & Co., 109 Ala. 421.

[14] Cocciola v. Wood-Dickerson Sup. Co., 44 So. Rep. (Ala.) 541. (June, 1907). Compare, however § 3212, Code of 1907.

suit.[15] But the decisions have extended the rule much further than the principle, until it had become established law, prior to the enactment of section 3212 of the Code of 1907 that all the co-plaintiffs who allege interest in the subject matter of the suit must be entitled to relief, or none could recover, and the suit was lost, even though the co-plaintiffs were merely joint heirs or next of kin claiming interests in an estate.[16] Under the liberal construction of the statutes granting amendments, it was held that the plaintiffs entitled to relief might amend by striking out the plaintiffs who could not recover;[17] but even with that privilege the rule was unjust and might cause great delay if invoked first in the Supreme Court.

This new section, 3212 of the Code of 1907, provides that the chancellor in rendering his decree may grant relief in favor of one or more plaintiffs as justice requires, and thereby clearly prevents the objection being taken after the hearing; but it is probable that this misjoinder is still ground for timely objection when raised in the early stages of the cause.[18]

§ 155. Creditors bills an exception.—This fatality to the whole suit when one co-plaintiff could not recover, probably never did extend to creditors bills, however.[19] In Steiner v. Parker,[20] a judgment creditor with his lien recorded joined with simple creditors in a suit to subject certain assets as the property of the debtor to the payment of their claims, and the court on appeal from a decision overruling a demurrer held it no error, as equity could adjust priority of liens. Of course the relief to the simple creditors would be different from that granted the lien creditor, if indeed they could get any specific right against the property at all. And again in

[15] Hardeman v. Sims, 3 Ala. 748.

[16] Otis v. Dargan, 53 Ala. 178; James v. James, 55 Ala. 525; Hutton v. Williams, 60 Ala. 107; Beebe v. Robinson, 64 Ala. 171; Jones v. Reese, 65 Ala. 134; Taylor v. Robinson, 69 Ala. 269; Mobile Savings Bank v. Burke, 94 Ala. 125.

[17] James v. James, 55 Ala. 525. In Knight v. Blanton, 51 Ala. 333, the court seems to have held that the lower court in granting relief to those entitled to recover, and denying it to the other plaintiffs, virtually allowed the amendment. Such a conclusion would hardly be followed, however.

[18] See § 175, et seq. post.

[19] Colgen v. Redman, 20 Ala. 650.

[20] 108 Ala. 357.

Taber v. Royal Ins. Co.[21] on a creditors bill to marshal the assets of a corporation, the court held that there could be but one administration of the trust fund, that all entitled to share as creditors became parties on proof of their claims, and that all other suits of other creditors were adjourned by the decree of administration into that suit and into the forum making the decree.

What the court would hold, if two creditors joined in one suit, and one failed to prove his claim, cannot be told of course. But it is not likely that the creditor with a good claim would have to amend at the hearing and start over again.

§ 156. Relief need not be co-extensive: rule for joinder of plaintiffs.—In order to join plaintiffs it is not necessary that all should be entitled to the same relief. The relief need not be co-extensive; it is sufficient for their interests to extend in common to the main purpose of the bill. Thus an administrator may join with an heir in a bill for partition of real estate if the administrator will have the renting of a part of the real estate when divided.[22] And a widow may join with the heir in a bill for partition, although her interest is only a dower right, and the heir's a fee.[23]

But two individuals who have separate grounds of complaint in the action of an association, cannot unite their suits in one bill by alleging a partnership and attempting to make it a bill to settle partnership affairs.[24] And of course parties having antagonistic interests cannot be joined as co-plaintiffs. Heirs seeking a statement of an administrators account, cannot join the administrator's sureties as co-plaintiffs in their bill, whatsoever their reason for doing so.[25]

Concluding therefore that as a general rule all co-plaintiffs must be entitled to relief, and concluding further that the relief granted to all must be the same to the extent of the main purpose of the bill, is there any rule by which we can determine the limit of divergence in the relief which the several plaintiffs can have in order that the bill may be main-

[21] 124 Ala. 681.
[22] Harbin v. Pope, 10 Ala. 493.
[23] Brewer v. Browne, 68 Ala. 210.
[24] Bestor v. Barker, 106 Ala. 240.
[25] Smith v. Smith, 102 Ala. 516.

tained? To this question Justice Ligon has replied,[26] "It is well settled that the misjoinder which will authorize a dismissal of the bill on final hearing" for that cause alone, "must be of complainants whose interests are so diverse that the chancellor cannot include them in one decree, or at least, must differ so widely as materially to affect the propriety of the decree."

The new section 3212 of the Code of 1907 does not seem to affect this proposition, since it only authorizes the court to deny all relief to plaintiffs not entitled to any relief whatever; and does not authorize the awarding of different sorts of relief in the same decree. Whether the new section 3095 affects it, however, will be discussed later under the subject of multifariousness.

Of course the last part of Justice Ligon's rule makes the point more uncertain than ever; but it will be recognized as involving the old question of equity jurisdiction, what bills are multifarious; and after reading all the decisions and all the text books the pleader would probably find nothing which makes him absolutely clear upon an undecided case.

§ 157. Rule dependent upon consent of all to join.—But even if several other parties in interest besides the moving plaintiff are entitled to the same relief as he, and would properly be made co-plaintiffs with him, it not infrequently happens that they do not desire it. Or sometimes they are infants or lunatics, and cannot be made plaintiffs without considerable delay and collateral procedure. Hence all rules for deciding who should be co-plaintiffs along with the plaintiff instituting the suit are qualified by the necessity for the proposed co-plaintiffs to desire and be ready to come before the court to sue. Parties interested in the subject matter, although entitled to sue, if unwilling to do so, must be made parties defendant. Thus it is a rule that an active trustee is the person to complain against third persons injuring the trust property, and the cestui que trust will not be heard unless he alleges that the trustee has refused to institute the suit.[27] If, however, the trustee upon request refused to bring suit, the trustee would have to be a party defendant; for the

[26] Michan v. Wyatt, 21 Ala. 813. [27] Bailey v. Selden, 112 Ala. 593.

holder of the legal title, as we have seen, must always be in court.[28] Again, we have seen that a tenant in common who finds it necessary to sue a stranger in matters arising about the common property, may make his co-tenant a party defendant, if the co-tenant is out of reach and cannot be found to join as a plaintiff to the suit.[29] And the only way bills for partition and for sales for division can be brought, is for one of the joint owners entitled to have the partition or sale, to file a bill against the other joint owners, asking that the partition or sale be decreed. For although all the joint owners may in fact desire the partition or sale, one at least must be a defendant.[30] It is thus apparent that the necessary parties defendant to a suit in equity embrace not only those from whom the plaintiff desires positive amends, but also those interested in the subject matter who cannot or will not all join the plaintiff in the suit, although they may themselves be entitled to all the plaintiff prays.

§ 158. What defendants may be joined.—The same rule does not obtain with regard to defendants to a suit in equity which has been stated with regard to plaintiffs to a suit, namely, that the bill must be good as to all or it will be good as to none; for if some parties defendant are merely improperly joined, without the relief asked against them being based upon a set of facts so different from that upon which relief is asked of the others as to render the bill multifarious, the improper parties will merely be disregarded in the decree, unless they are relieved of continuing through the cause by their own motion.[31] But it often happens that there are more than one person against whom the plaintiff desires positive relief at the same time; so at the expense of encroaching somewhat upon the subject of multifariousness in the bill, or that defect of attempting to combine improperly more than one cause of action in the suit, it would be well to note generally what defendants against whom the plaintiff desires separate relief should be joined in one bill.

[28] Hambrick v. Russell, 86 Ala. 199; Stone v. Hale, 17 Ala. 557.

[29] Parkman v. Arcadi, 34 Ala. 393.

[30] Marshall v. Marshall, 86 Ala. 383.

[31] See Chapter VI. post. And compare latter part of § 3212, Code of 1907.

§ 159. What defendants may be joined (continued).—It may be accepted that "Where the object of the suit is single, it is no objection that the different defendants have separate interests in distinct and independent questions, provided they are 'all connected with and arise out of the single object of the suit'." "The reason of the rule is that courts of equity are averse to a multiplicity of suits, and always strive to prevent unnecessary and useless litigation, so far as they can, without on the other hand vexing parties with the litigation of questions with which they have no concern."[32] Thus in a bill to assert a vendor's lien, adverse holders of the land under tax sales held after the accrual of the vendor's lien are properly made co-defendants.[33] And in a creditors' bill to set aside fraudulent transfers by the debtor of his property, all fraudulent vendees should be joined, though they held by separate conveyances,[33] especially if the conveyances are all parts of one fraudulent scheme.[34]

§ 160. Rule for joining defendants.—We may then generalize again by saying that all persons whose apparent interest it is to resist the plaintiff's bill must be defendants to the suit.[35] This includes of course not only holders of property transferred to them by insolvent debtors, but also holders of property for value whom it is sought to charge with notice, making them resultant or constructive trustees;[36] also all sureties or guarantors who are to be called upon to contribute to the plaintiff's demands;[37] all junior mortgagees or lienors, whose claims are to be cut off by the decree prayed by the plaintiff;[38] all devisees, remaindermen, or legatees to whom a deceased debtor may have willed the subject matter of the suit;[39] all heirs of deceased mortgagors against whom a mortgage is to be foreclosed;[40] administrators of deceased mortgagors, when their interest is to protect the personal property

[32] Per Somerville, J. in Randle v. Boyd, 73 Ala. 282.

[33] Hill v. Moone, 104 Ala. 353; Burford v. Steele, 80 Ala. 147.

[34] Collins v. Stix, 96 Ala. 338

[35] 1 Daniell Ch. Pr. 315, et seq.

[36] Bryant v. Young, 21 Ala. 264.

[37] See § 144 supra.

[38] See § 148 supra.

[39] Saunders v. Godley, 23 Ala. 473.

[40] Duval v. McCloskey, 1 Ala. 708; Erwin v. Ferguson, 5 Ala. 158.

from residue judgments,[41] or where the plaintiff seeks an account;[42] all parties to a former decree or judgment sought to be annulled;[43] and all signatories to an instrument sought to be reformed.[44]

§ 161. Defendants fixed by prayer for process.—Those only are parties defendant to a suit against whom process is prayed;[45] and if process is prayed against a party, and it is prayed that he be required to answer, he is a party defendant, even though his interest does not appear by appropriate averments in the bill.[46] So if a plaintiff has made a person a party defendant, even though an unnecessary party, the plaintiff cannot avoid a reversal of the decree and remanding of the cause by the Supreme Court for an error in perfecting the service, from the fact that the decree could have been rendered without the party in question.[47]

It must be remembered, too, that a defendant must be made a different party in each capacity in which relief is sought of him, and process must be prayed against him in each capacity, whether it be as an heir and as executor, as an individual and a receiver; for if he be not brought before the court in each capacity in which he has an interest, his actual presence will not sustain a decree against him in the other capacity than that in which he was made a party, and the decree will be reversed in the Supreme Court.[48]

[41] Hitchcock v. U. S. Bank, 7 Ala. 386; Wilkins v. Wilkins, 4 P. 24.

[42] Erwin v. Ferguson, 5 Ala. 158.

[43] McGlathery v. Richardson, 129 Ala. 653.

[44] Kinney v. Ensminger, 87 Ala. 340.

[45] Lucas v. Bank of Darien, 2 Stew. 280, 324; Walker v. Hallett, 1 Ala. 379.

[46] Bondurant v. Sibley's Heirs, 37 Ala. 565.

[47] Batre v. Auze, 5 Ala. 173.

[48] Carter v. Ingraham, 43 Ala. 78.

CHAPTER VI.

Of the Parties to a Suit.—(Continued.)

Of Objections for Non-joinder of Parties, and of Objections for Mis-joinder of Parties.

§ 162. Any defendant may object for omission of parties.—First of objections for non-joinder of parties, that is, objections for the omission of parties believed to be necessary to the proper consideration of the suit. If there is any person not made a party plaintiff or defendant to the bill of complaint whose interest in the subject matter of the suit, or whose connection with the transaction made the basis of the suit, is such that without him the rights of the parties cannot be finally determined, any defendant may object to proceeding with the cause. This arises as a corollary from the principle of equity procedure requiring "to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation."[1]

§ 163. Omitted party cannot object.—But a person not made a party to the bill by the plaintiff cannot of his own motion intervene and be made a party, however necessary to the doing of complete justice his presence in fact may be.[2] The plaintiff is entitled to decide with whom he wishes to litigate. "In the absence of statute or rule, a court of equity cannot, on the application of a stranger, make him a party to a pending suit, without the consent of the complainant, for the purpose of allowing such party to litigate with complainant his right or title to any relief whatever."[3]

§ 164. When a stranger can intervene.—If the stranger does not desire to litigate, however, but merely wishes to inter-

[1] 1 Daniell Ch. Pr. 240.

[2] Renfro v. Goetter, 78 Ala. 311; Ex parte Printup, 87 Ala. 148; Louisville Mfg. Co. v. Brown, 101 Ala. 273.

[3] Per Clopton, J. in Renfro v. Goetter, 78 Ala. 311.

vene to obtain his share of a trust fund in process of administration by the court, he is entitled to an order of court on appropriate petition, granting him that right.[4] And even where there is no general administration in process, but there is a fund in court or in the hands of a receiver, to which, after the satisfaction of the plaintiff's demands, the stranger is entitled, he can intervene by petition and become a party to the suit; and if the application is denied by the chancellor, mandamus will lie to compel his admission and the determination of his claim.[5] As the plaintiff usually has no reason for being antagonistic to such a petition, however, it is apparent that such intervention is with the plaintiff's presumed consent.[6] But such a proceeding is not the stranger's only remedy. He can obtain appropriate relief by an original bill, which the court will regard as in the nature of a supplemental bill, and consider along with the principal cause.[7]

But although a stranger cannot intervene and become a party to litigation on his own motion, the defendant is not the only person who can object to proceeding with a cause when all interests are not before the court. It is the duty of the court to avoid incomplete litigation; and if the chancellor note a want of parties even at the hearing of the cause, he may of his own motion order the bill to stand over on leave to amend, or dismiss it without prejudice.[8] Or the Supreme Court may of its own motion first note the defect when the cause is carried up for other error.[9]

§ 165. If necessary party omitted plaintiff may amend.— In whichever way the want of parties is raised, however,

[4] Ex parte Printup, 87 Ala. 148; Louisville Mfg. Co. v. Brown, 101 Ala. 273.

[5] Ex parte Breedlove, 118 Ala. 172; Carlin v. Jones, 55 Ala. 624. And compare Chancery Rule 106 Code of 1907, (108 Code of 1896) which allows strangers to file such petitions where the proceeds result from mortgage sales.

[6] In Carlin v. Jones, 55 Ala. 624, the plaintiff very vigorously objected to the intervention, but it does not appear that he was affected by the addition of the intervenors.

[7] Talladega Mercantile Co. v. Jennifer Iron Co., 102 Ala. 259.

[8] Goodman v. Benham, 16 Ala. 625; McGlathery v. Richardson, 129 Ala. 653.

[9] Hambrick v. Russell, 86 Ala. 199; Langley v. Andrews, 132 Ala. 147.

whether by pleadings of a defendant to the bill, or by the court's own motion, the plaintiff must himself consent and voluntarily add the necessary party to the cause.[10] And he should always be given an opportunity to add the missing parties by amendment. To dismiss the bill for want of necessary parties without giving opportunity to amend, is error.[11] And when the omission is first noted at the hearing, or in the Supreme Court, the cause will be ordered to stand over, or be remanded to allow the amendment, or to allow a supplemental bill to be filed to the same end.[12]

Even when the defect of parties has been raised in the lower court and the plaintiff has refused to amend, by the early decisions, the Supreme Court, though sustaining the point of the necessity of the parties, would not dismiss the suit absolutely, but only without prejudice.[13] In more recent decisions, however, when the plaintiff had a chance in the lower court to amend, and refused to do so, the Supreme Court held that "the most that could have been done would have been to dismiss his bill."[14] But really, "the fact that the decree does not direct the dismissal to be without prejudice is wholly immaterial; for if the plaintiff can make out a case against other parties in connection with the defendant, it cannot be pleaded in bar of a new suit."[15]

§ 166. Right to bring in omitted party by amendment not statutory only.—This right of amendment to the plaintiff after decree sustaining an objection for want of parties, is not based alone upon the Alabama Statutes providing for amendments. It was a rule of old English practice; for while, as we shall see, a decree sustaining a general demurrer for want of equity in a bill resulted in English practice in the dismissal of the suit without opportunity to amend, a de-

[10] Goodman v. Benham, 16 Ala. 625; Ex parte Printup, 87 Ala. 148; Renfro v. Goetter, 78 Ala. 311.

[11] Tindal v. Drake, 51 Ala. 574.

[12] Cruikshank v. Luttrell, 67 Ala. 318; Anderson v. Harris, 12 Ala. 580; Rugley v. Robinson, 10 Ala. 702, 745.

[13] Andrews v. Hobson, 23 Ala. 219; Singleton v. Gayle, 8 P. 270.

[14] Flournoy v. Harper, 81 Ala. 494; Renfro v. Goetter, 78 Ala. 311.

[15] Per Collier, C. J. in Goodman v. Benham, 16 Ala. 625, 631.

cree sustaining a demurrer for want of parties never put the suit so out of court but that the plaintiff if he chose could bring in the missing parties by amendment, and proceed with the cause.[16] And so also when the defect was raised by other pleading.

§ 167. Methods of objection for non-joinder.—Now as to the methods of making objection for want of parties.

When the defect appears upon the face of the bill, it must be raised by demurrer. But if the defendant fails to demur and puts in his answer, and it turns out from the answer that the missing parties were not indispensable, and that their absence does not effect the equity of the bill, the cause will proceed without regard to the formal defect.[17] And so even if the demurrer is incorporated in the answer under the statutory privilege to incorporate all defenses in the answer.[18] But if the bill shows sufficient excuse for omitting the party in question, of course the demurrer will be overruled.[19]

Moreover the more recent decisions held that the demurrer raising the objection must state the names of the necessary omitted parties,[20] although that would seem to impose more upon the defendant than merely to defend himself. It would seem sufficient, however, to point out the missing parties with enough certainty to enable the plaintiff to identify them and bring them in on preparing his amendment.[21] And this was the English rule.[22]

§ 168. Methods of objection for non-joinder (continued).—If the defect of parties does not appear upon the face of the bill, of course the defendant may raise his objection by plea; and in that event of course the plea must not only identify the missing parties, but aver or show that they are necessary.[23] And such a plea, unless to a bill for discovery, is a plea in bar

[16] 1 Daniell Ch. Pr. 336.

[17] Chapman v. Hamilton, 19 Ala. 121.

[18] Craft v. Russell, 67 Ala. 9.

[19] Watts v. Gayle, 20 Ala. 817.

[20] Thornton v. Neal, 49 Ala. 590; Chambers v. Wright, 52 Ala. 445.

[21] Chapman v. Hamilton, 19 Ala. 121.

[22] 1 Daniell Ch. Pr. 335.

[23] 1 Daniell Ch. Pr. 337; Prout v. Hoge, 57 Ala. 28; Sawyers v. Baker, 66 Ala. 292.

of the suit.[24] But there is no reason why the defendant should raise the objection by a plea if he prefers for any good reason to answer the bill at once; for he can raise the objection for the want of parties in his answer.[25] And while not raising the objection by the time of his answer would ordinarily be a waiver of the defect, if the party is indispensable to the rendering of the proper decree, the defect can be taken advantage of at the hearing, or on error.[26]

§ 169. Objection for non-joinder of either plaintiffs or defendants made in the same way.—These rules apply as well to objections for want of parties plaintiff as to objections for want of parties defendant, since as we have seen, there is no party but the chief plaintiff who may not be made a party defendant, even though he might be a plaintiff if he desired to be one. Indeed some of the decisions cited are upon objections for non-joinder of parties plaintiff, and others are upon objections for non-joinder of parties defendant.

§ 170. Misjoinder of parties: different kinds.—Objection for misjoinder of parties may be taken on account of misjoinder either of parties plaintiff, or of parties defendant. Misjoinder of parties plaintiff occurs where two or more persons whose causes of action are really distinct attempt to sue together in one bill; and it also occurs where one or more persons entitled to bring a given suit in equity join with them others who are not entitled to sue at all, and are therefore improper parties to the suit. The former class embraces those instances of misjoinder of parties plaintiff which arise from the fact that the bills are also subject to demurrer for multifariousness, that is to say, the bills set forth more than one cause of action, the cause of action of each plaintiff being in fact distinct. The latter class of misjoinders are more properly so called; for they are instances of good causes of action against given defendants to the conduct of which the presence of some party plaintiff is either unnecessary, or is prohibitory.

[24] 1 Daniell Ch. Pr. 337.
[25] Bibb v. Hawley, 59 Ala. 403.
[26] Prout v. Hoge, 57 Ala. 28; McCully v. Chapman, 58 Ala. 325; Boyle v. Williams, 72 Ala. 351; Lawson v. Ala. Warehouse Co., 73 Ala. 289; Langley v. Andrews, 132 Ala. 147.

§ 171. First kind, misjoinder of persons with distinct claims.—The extent to which persons who have no special interest in the subject matter of the suit may be joined with the chief plaintiff because equally interested with him in the object of the suit, has already been discussed in the chapter on proper and necessary parties.[27] In the main it was found that with the exception of simple contract creditors joining in creditors' bills, only those who had a distinct interest or lien upon the subject matter could be properly joined in the suit. On the other hand, the question when persons have no common interest even in the object of the particular suit, but merely have similar claims, or the right to file similar suits, so that their joining in one suit makes the bill display the defect of multifariousness, must be reserved for a fuller investigation under the subject of multifariousness as a ground of objection to the bill.[28] For the present it is sufficient to note that when a bill is multifarious for the reason that plaintiffs who should have sued separately have attempted to sue together, the defect may be raised by a defendant by an objection for misjoinder of parties plaintiff, instead of by an objection for multifariousness.[29] And in determining whether to make objection for misjoinder of parties on the ground that the plaintiffs have separate causes of action, a good practical test is, are the interests of the plaintiffs so diverse that relief cannot be granted in one decree? or at least if granted in one decree, would the propriety of the decree be materially affected?[30]

§ 172. Second kind, bringing in persons not interested in the suit.—The second class of misjoinders of plaintiffs embraces those instances where multifariousness does not exist, but the proper plaintiffs from oversight or overzeal have joined with them as parties persons who have really nothing to do with the suit, or persons whose presence prevents any recovery. A defendant may and should object if persons having no interest are joined with the plaintiff in the suit.[31]

[27] See §§ 120, 121, 122, 127, ante.

[28] See §§ 234, 261, post.

[29] Bestor v. Barker, 106 Ala. 240; Mobile Savings Bank v. Burke, 94 Ala. 125; 1 Daniell Ch. Pr. 350.

[30] Michan v. Wyatt, 21 Ala. 813, 827.

[31] 1 Daniell Ch. Pr. 347, et seq.

Thus a mortgagor cannot join with him the holder of the equity of redemption before the foreclosure and the transferee of the statutory right of redemption after the foreclosure, in a suit rested upon the statutory privilege which the mortgagor has for two years to redeem the property sold under the mortgage.[32] The statute formerly did not give the statutory right of redemption to the holder of the equitable right of redemption, and the statutory right of redemption was not assignable; so the mortgagor was the only one of the three parties plaintiff who had any statutory right to sue. The others were improper parties. Likewise where two joint obligees on a bond were secured by a mortgage and one died, the heirs of the deceased obligee inherited the title to the mortgaged property, and were the proper persons to join with the surviving mortgagee in a bill for a strict foreclosure of the mortgage. The executors had no interest in the suit and were held improper parties.[33]

§ 173. Misjoinder because one of the plaintiffs has lost his right.—Where one of the parties plaintiff may have had the same right to sue originally which the others have, but for some reason has lost his right, his presence as a plaintiff with the others is also a misjoinder. If the statute of limitations has run against one of the plaintiffs but not against the others, it renders the bill subject to objection for misjoinder.[34]

So where several plaintiffs file their bill as next of kin of a decedent, and reveal that one of them claims as the child of a relative of the decedent who had died prior to the death of the decedent, and so could not be his distributee if living, the bill is defective for misjoinder.[35] And where five partners join in a bill and there is an equitable defense against one of them, his presence makes their suit a misjoinder.[36]

§ 174. The old rule that all plaintiffs must be able to recover or none could do so.—The old rule laid down in the Alabama decisions has already been stated, that where two or more persons joined in an action, and one or more of them

[32] Commercial Real Estate &c. Asso. v. Parks et al. 84 Ala. 298.

[33] Erwin v. Ferguson, 5 Ala. 158.

[34] Hardeman v. Sims, 3 Ala. 747.

[35] Plunkett v. Kelly, 22 Ala. 655.

[36] Plant et als. v. Voegelin et als. 30 Ala. 160.

could not recover for any reason, the right of all to recover upon the bill was lost; or stated briefly, all the parties plaintiff must be entitled to recover or none could do so. Probably the rule was an outgrowth of the common law rule that joint obligees must all be able to sue on a joint claim or the claim is discharged, and was extended to joint suits in equity of all sorts, whether the ground of action were a joint claim or not.[37] But be that as it may, except in the case of creditors' bills,[38] the rule was firmly established.[39]

This rule, like the rule upon joint claims at common law that a defense against one obligee discharged the obligation, seems to have been a rule of substantive law. It was called into play by a purchaser for cash of a slave by setting up the facts in his answer which showed that the statute of limitations upon which he relied had run against one of the plaintiffs.[40] It was recognized as operating to sustain a plea of the statute of non-claim incorporated in an answer and proved against one of the plaintiffs.[41] It was recognized as defeating a cause when the proof showed that most of the plaintiffs had been guilty of laches;[42] and the court held that laches need not be pleaded. It is probable, therefore, that it could have been recognized by the court ex mero motu, without the defendant raising it at all, if the party not entitled to recover was barred by a fault extending to his equity, like laches, which unlike the statute of limitations did not have to be specially pleaded.[43] But if the court took note of it of its own motion, just as the court does when it is compelled to note of its own motion a non-joinder or absence of necessary parties,[44] it gave the plaintiff entitled to sue leave to amend by striking out the parties who could not recover.[45]

[37] See § 154, ante.

[38] See § 155, ante. And compare Colgin v. Redman, 20 Ala. 650.

[39] Lovelace v. Hutchinson, 106 Ala. 417. And see additional authorities collected in the notes to § 154, ante.

[40] Hardeman v. Sims, 3 Ala. 748.

[41] Taylor v. Robinson, 69 Ala. 269.

[42] James v. James, 55 Ala. 525, 533.

[43] Laches was ground to dismiss for want of equity. Espy v. Comer, 76 Ala. 501.

[44] See §§ 164, 165, supra.

[45] James v. James, 55 Ala. 525; Lovelace v. Hutchinson, 106 Ala. 417, 424.

This rule, then, has always been a good ground for objection for misjoinder of parties plaintiff, whether it be called into play by a defendant or by the court; and from its nature it would most likely be presented as a ground of objection at the hearing on full proof of the bill and answer. For if the inability of one plaintiff to recover for any other reason than those which would bar a joint obligee at common law, should appear on the face of the bill, he would be merely a disinterested party, whose presence should be objected to by demurrer. It was early held that the objection to the presence of such a clearly disinterested party came too late at the hearing.[46]

In one class of cases the rule could not be applied at the hearing, and that was creditors' bills. On the principle that everybody may foresee that some creditor will be unable to prove his claim, a creditors' bill was held to be outside the rule, and objection could not be made at the hearing after some creditor had so failed.[47]

§ 175. Effect of new section 3212 of the Code.—The law in this condition must now be considered as affected by the new section 3212 of the Code of 1907, "On the submission of any cause for final decree, the chancellor may render decree granting such relief as the equity and justice of the case may require, in favor of any one or more complainants, and denying relief to any one or more complainants, and against any one or more defendants as they may be entitled under the facts, or may, if justice shall require it, set aside the submission for the purpose of amendment, or taking further testimony."

So far as the new section gives the court the power on its own motion to set aside the submission for amendment with respect to parties, it is declaratory of the power which the court had before, and which it has always exercised, as we have seen, when it notes of its own motion at the hearing a want of proper parties to the cause. And with this power already possessed by the court, the additional power to render a decree for the plaintiffs entitled to recover, without having

[46] Erwin v. Verguson, 5 Ala. 158.

[47] Colgin v. Redman, 20 Ala. 650.

them amend by striking out the plaintiffs not entitled to recover, is important only in saving time and costs.

§ 176. Effect of new section 3212 (continued).—But the old rule is abolished in so far as the inability of one plaintiff to recover in the absence of amendment involves the loss of the entire suit; and the only question in that connection is whether the fact that one plaintiff cannot recover, is still an objection which the defendant can raise,—indeed, whether misjoinder of parties plaintiff is any longer an objection to a bill. The importance of it survives as a question of costs. If the defendant can remove an improper plaintiff by a demurrer or by the proof of a plea, he reduces the cause at the cost of the dismissed party, whereas if the improper plaintiff can stay in the suit he can himself amass considerable costs, which may either on a final decree, or by way of terms to correct some misstep, fall eventually upon the defendant.

§ 177. Effect of new section 3212 (continued).—Although the wording of the new section is broad enough even to abolish multifariousness arising from many plaintiffs joining many causes of action as ground of objection by the defendant for misjoinder of parties, it is submitted that such was not the intention of the legislature. Objection for misjoinder of parties probably will still be held a proper step by a defendant; and unless taken at the first stage of the cause at which it can be noted, misjoinder will probably be held waived and the risk of costs assumed; and the only effect of the statute will be to cut off in future all chance of the injustice to a deserving plaintiff of losing his cause because he kept company with a plaintiff whose right is barred.

§ 178. Effect of new section 3212 (concluded).—In one respect, however, the new statute is dangerous. Allowing as it does that the chancellor "grant such relief as the equity and justice of the case may require," it may furnish opportunity to render a decree in equity for one joint obligee on a debt which has been discharged at law by some act of his co-obligee, and thus make different laws for choses in action in equity and at law. It is to be hoped, however, that no hard case will present itself and bring forth such a decision

before the statute shall have been construed not to affect joint obligations.

§ 179. Methods of objection for misjoinder of plaintiffs.—If, then, objections for misjoinder of parties plaintiff still obtain, they are governed by the same decisions which governed them heretofore. If the misjoinder appears on the face of the bill, objection to it must be taken by demurrer;[48] for if the objection was so apparent, it is held that it comes too late at the hearing or on appeal.[49] Indeed if the demurrer is incorporated in the answer under the statutory privilege to do so, and the answer shows facts that make the joinder good, it is probable that the demurrer would be overruled; since it is held that an apparent non-joinder of parties may be healed by an answer showing that all the necessary parties are before the court.[50]

§ 180. Methods of objection for misjoinder of plaintiffs (continued).—Of course if the misjoinder does not appear on the face of the bill, the defendant may raise it by plea, or along with his answer. Or if the defendant is ignorant of the misjoinder, but it appears from the evidence at the hearing, the objection may be taken then.[51] This seems not to have been presented in Alabama for decision, but in holding that the objection comes too late on appeal, or at the hearing, unless the propriety of the decree will be materially affected, the Supreme Court thereby recognized the right to object as soon as the defendant learned of the misjoinder, at whatever stage of the cause it appeared.[52]

When the objection is properly taken at the hearing, however, the court will certainly suspend action until the plaintiffs have leave to amend; or if it acts under the new section 3212 of the Code of 1907, and gives relief to the plaintiffs

[48] Lehman v. Greenhut, 88 Ala. 478; Marsh v. Richardson, 49 Ala. 430; Vaughan v. Lovejoy, 34 Ala. 437; Erwin v. Ferguson, 5 Ala. 158. Colbrun v. Broughton, 9 Ala. 351; Whitaker v. DeGraffenreid, 6 Ala. 303.

[49] Newhouse v. Miles, 9 Ala. 460; Erwin v. Ferguson, 5 Ala. 158; Lehman v. Greenhut, 88 Ala. 478.

[50] Craft v. Russell, 67 Ala. 9; Ramage v. Towles, 85 Ala. 588.

[51] 1 Daniell Ch. Pr. 350.

[52] Lehman v. Greenhut, 88 Ala. 478; Erwin v. Ferguson, 5 Ala. 158.

entitled to it, it would assess the plaintiffs not entitled to sue with the costs incurred by them. If the cause turned out at the hearing to be a misjoinder of plaintiffs as a result of improperly uniting their suits, and objection were then first taken; if the objection were allowed, probably no relief could be granted to either plaintiff, for the reason that each had the right to sue separately, and neither could be given the preference in amending by dropping the other. In that event, probably the old English chancery practice should be followed of dismissing the bill without prejudice.[53]

§ 181. Objection for misjoinder of parties defendant.—Apparently by the English practice there was just the same ground for any defendant to demur for misjoinder of parties defendant as for misjoinder of parties plaintiff.[54] And the reason is clear; every defendant is interested that the costs of a suit be as small as possible, and the presence of every additional party, whether as plaintiff or as defendant, increases the costs. But it has long been the established rule in Alabama that no defendant can object to the misjoinder of parties defendant but the misjoined party. The defense is personal to him.[55] And he must raise his objection by demurrer, at least if it appears upon the face of the bill.[56] If it does not appear from the bill that he is without interest, however, or if it is averred that he has an interest, of course he must not demur, but must file a plea or a disclaimer.[57] And in one of our early cases it was very properly added that "a party improperly made defendant, and who wishes to be discharged without the payment of costs, must not only disclaim all interest in the controversy, he must also abstain from engaging in the defense of the suit."[58]

We are now ready to proceed to the examination of the bill.

[53] 1 Daniell Ch. Pr. 350

[54] 1 Daniell Ch. Pr. 342, et seq.

[55] Norwood v. M. & C. R. R. Co., 72 Ala. 563; Bolling v. Vandiver, 91 Ala. 375.

[56] Toulmin v. Hamilton, 7 Ala. 362.

[57] 1 Daniell Ch. Pr. 346.

[58] Holman v. Bank of Norfolk, 12 Ala. 369, 406.

CHAPTER VII.

The Bill.

Of the Different Kinds of Bills, and the Necessary Matter of Bills.

§ 182. A suit in equity commenced by a bill.—Application to a court of equity to take jurisdiction of a cause of action is made by presenting the cause to the attention of the court by means of a bill. Bills in equity are an offspring of the procedure in the Roman Law as it came down through the Canon Law in the church courts.[1] So the bill used in a court of equity was called by way of distinction an "English bill."[2]

§ 183. The different kinds of bills.—Bills in equity are of several sorts, according to whether they present the original cause of action, or matter growing out of it, or whether they seek relief from the defendant, or merely discovery of matters in the knowledge of the defendant for use in another cause, or merely a review of matters by the court.

One of the best statements of the different kinds of bills in equity may be found in Puterbaugh's Chancery Pleading and Practice in Illinois; and it is so clear that it would be best to adopt it without change.[3]

"Bills in chancery are divided into those which are original, and those which are not original. If they relate to matters which have not previously been brought before the court, they are termed original bills, such as form the greater part of the business of a court of chancery. Bills not original are those which relate to some matter already litigated in the court by the same parties, and which are either in addition to, or a continuance of, an original bill, or both. There is another class of bills, which is of a mixed nature, and sometimes partakes of the character of both of the others. Thus, for example, bills brought for the purpose of cross litigation, or controverting, or suspending, or reversing some decree or

[1] Langdell Equity Pleading, Introduction.

[2] 1 Daniell Ch. Pr. 351.

[3] Puterbaugh Ch. Pl. & Pr. 12.

order of the court, or of obtaining the benefit of a former decree, or of carrying it into execution, are not considered as strictly a continuance of the former bill, but in the nature of original bills.[4] And if these bills require new facts to be stated, or new parties to be brought before the court, they are so far strictly of the nature of supplemental bills."

From here Puterbaugh adopts Daniell's language as follows:

"Besides the different divisions of bills here enumerated, original bills are usually divided into: first, original bills praying relief; and secondly, original bills not praying relief. Original bills praying relief, are again sub-divided into three heads: first, original bills praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited; secondly, bills of interpleader; and thirdly, certiorari bills. Original bills not praying relief are of two kinds: first, bills to perpetuate the testimony of witnesses; and secondly, bills of discovery."[5]

To the above classification of bills cognizable in general equity jurisdiction must be added certain bills for which jurisdiction is expressly given in Alabama by statute. They comprise at present bills to remove the disabilities of nonage, and bills to quiet the title to real estate.[6]

§ 184. Nature of a bill determined by its substance.—But while classifications of bills are necessary for a proper study if equity pleading, and the good pleader will give his bill the right name; yet the Supreme Court of Alabama has very wisely held that "the real nature of a bill is to be determined rather by its substance—that is, by its allegations and object—than by the title which the pleader choses to give it."[7] So the plaintiff will not lose his cause merely because he names it improperly.

[4] Compare, Talladega Mercantile Co. v. Jenifer Iron Co., 102 Ala. 259; Ex parte Printup, 87 Ala. 148; Ex parte Smith, 34 Ala. 455.

[5] 1 Daniell Ch. Pr. 351.

[6] Before the present statutes gave married women the right to act as if sole, there was a statutory proceeding in chancery to relieve married women of the disabilities of coverture, Code of 1876 § 2717.

[7] Ex parte Smith, 34 Ala. 455. And see Sayre v. Elyton Land Co. 73 Ala. 85.

§ 185. Necessary subject matter of all bills for relief may be treated together.—At the end of Chapter I it was said that the bills we have chiefly to consider are original bills seeking relief upon rights claimed by the plaintiffs in opposition to rights claimed by the defendants, bills for discovery, and certain statutory bills. The necessary averments of statutory bills are almost entirely provided for by statute, and will not be considered until such bills are discussed in full, bills of discovery, too, present individual features in addition to those common to the framing of all bills, and certain averments necessary to them will have to be discussed when we discuss their form.

But the necessary averments in all bills seeking relief may be treated together; for the plaintiff must state his case to the court in accordance with the same requirements, whatever the kind of relief he may be seeking.

§ 186. Presentation of subject matter is to be considered.—In discussing the necessary matter in a bill, it is not proposed to consider the causes of which a court of chancery may take cognizance. That is the domain of equity jurisdiction. But assuming that the plaintiff has a complaint or claim upon which he should seek relief of a court of equity, he must first carefully consider how he must tell his story to the court; and that is what is now to be discussed.

§ 187. Cause often lost by defective bill.—The plaintiff who has a good cause of action may lose it, or be unnecessarily delayed in obtaining his relief, by not telling the court enough of his story, or by telling it so carelessly and inexactly that the court, which must act upon the written statement of his cause, could not possibly give him the relief he deserves without filling in his statement with many matters which he has failed to tell.

Before the abolition of the motion to dismiss for want of equity, by the Code of 1907,[8] the failure to aver in the bill all the points necessary to obtaining relief, was fatal to the cause if the plaintiff allowed a decree to be made on such a motion before he asked leave to amend. And now even

[8] Code of 1907, § 3121; Tait v. Am. Freehold Mtge. Co., 132 Ala. 193.

if the plaintiff may amend after a decree that his bill shows no equity, his careless statement of his cause will cost him much delay and useless expense.

§ 188. Bills should be clear: cardinal rule.—It is necessary, then, that the bill should set out clearly and distinctly all the facts connected with the cause of action which are involved in the plaintiff's right to relief. The plaintiff must tell the court in his bill every thing which he will have to prove to obtain his decree.

"It is a cardinal rule, founded in reason and good sense, that the bill should state the title or claim of the complainant with accuracy and clearness, and with such certainty that the defendant [and it should be added the court] may be distinctly informed of the nature of the case which he is called upon to meet. If the facts essential to the right of the complainant are not clearly and unambiguously alleged, the defect will be fatal; for no facts are properly in issue, unless charged in the bill, and no proof can be made of, or relief granted for facts not charged."[9]

§ 189. Common law pleading formerly more strict than equity.—Time was when it was unnecessary so to emphasize this feature of pleading. At common law, and indeed late into the history of common law pleading in Alabama, it was necessary to draw a declaration at law even fuller than a bill in equity.

In 1855, the court said:[10] "The rule as to form in pleading is not so stringent in equity as at law, but the substance of the rules is the same in each court; and it is a principle of universal application in pleading, founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case he is called upon to defend."

[9] Per R. W. Walker, J., in Duckworth v. Duckworth, 35 Ala. 70. And see Seals v. Robinson, 75 Ala. 373; S. & N. R. R. Co. v. Highland Ave. & B. R. R. Co., 117 Ala. 395, 410; Garnett Smelting & Dev. Co. v. Watts, 140 Ala. 449.

[10] Cockrell v. Gurley 26 Ala. 405.

§ 190. Common law pleading now more lax.—Since that statement of the law it is the common law pleading in Alabama that has become inexact rather than the equity pleading. Nor is it surprising that the common law pleading has become less accurate. Probably one half the pleading at law is done under present practice on the day of the trial; and no continuance of the cause is granted by the court unless one party sets up a new claim so unexpected as to make an entirely new cause of action. So partly as the result of haste and partly to avoid giving the other party the right to a continuance, the pleadings at common law now give so little information of the real claims and defenses relied upon by the parties, that the real pleadings may be said to be the oral arguments upon the evidence.

§ 191. Equity pleading still exact.—Pleading in equity has not substantially changed, however. The pleadings are prepared at the parties' leisure; the evidence, whether taken orally or upon written interrogatories, is presented to the court in writing, and the cause is considered by the chancellor without the haste incident to a common law jury trial. So that it is not improper that the written statement of the cause and defenses should retain that accuracy, which, with the right of amendment, has seemed conducive to justice.

A statute has provided,[11] coming down to us from 1852, that "the bill must contain a clear and orderly statement of the facts upon which the suit is founded, without prolixity or repetition, and conclude with a prayer for the appropriate relief." But this is not held to change the practice followed before the statute was enacted. Chief Justice Brickell said in 1883,[12] after quoting the statute, "A bill conforming to this requirement, under the practice and decisions of this court, would have been deemed unobjectionable before the enactment of the statute. The statute has not, however, been construed as in derogation of the cardinal rule, as it has been frequently termed, that the bill must show with accuracy and clearness all matters essential to the complainant's right to relief."

[11] Code of 1907, § 3094.

[12] Seals v. Robinson, 75 Ala. 363 368.

It will be a help to the pleader now to see how this "cardinal rule" has been applied.

§ 192. Plaintiff's title must be set out.—In the first place the plaintiff's title or claim to property, real or personal, made the subject matter of the suit, must be distinctly set forth. Thus in Cockrell v. Gurley [13] where the object of the suit was to protect the title of the plaintiffs to a "remainder" in certain slaves, the bill alleged "that by the statute laws of Kentucky, at the time of the death of A and the allotment of dower to his widow as aforesaid, she was only entitled to a life interest in the said negro Chaney and her increase, and the estate in remainder vested in the said Mary Ann," the plaintiff. These were the only allegations of title in the bill; and on demurrer, the court held that in the absence of an allegation that dower had been allotted in accordance with the laws of Kentucky, it must be presumed that the common law obtained in Kentucky, and that dower interest by way of a life estate in personal property would be impossible.

So in Rapier v. Gulf City Paper Co.[14] the court interpreted the bill to seek a redemption of the real estate described from a mortgage; but the instrument did not in express terms, transfer any right or interest in the real estate, but at most appropriated it to the use of a particular newspaper business in the hands of persons against whom the plaintff had a judgment. And the court held that although a judgment creditor might redeem from a mortgage, the bill had not the necessary allegations to entitle it to that relief in reference to the real estate.

§ 193. Plaintiff's title must be set out (continued).—And where the plaintiff sought to establish a resultant or constructive trust in land, but merely alleged in his bill that the defendant, who was his son and mercantile agent, had received conveyances in his own name of the lands and paid for them with money, goods, notes, and accounts belonging to the plaintiff, and that the plaintiff ratified the purchases and released the grantors, the court held that there was not enough alleged in the bill to grant the relief asked. "For ought that

[13] 26 Ala. 405. And see Goldsby v. Goldsby, 67 Ala. 560.

[14] 64 Ala. 330.

appears in the bill to the contrary the complainant may have authorized the purchase of the lands, the use of his money in payment therefor, and the taking of title in his son's name; or his son may have purchased the lands on credit on his own account and in his own name, and afterwards used complainant's money, with his consent, to pay the purchase money when it became due."[15]

§ 194. If title is derived by inheritance, bill must show heirship.—When the plaintiff's title is derived by inheritance he must show how he is heir; and if he claims by mediate, not immediate descent, he must also show the pedigree. Therefore where the plaintiffs were the next of kin, and as such were entitled by law to the personal property of their ancestor, their bill to enforce his lien upon land, was held insufficient to give them rights when they described themselves as his only heirs at law, without averring in what state their ancestor died. For if their ancestor had died a resident of this state "the bill should aver that there is no widow, and that complainants are either his children or next of kin, and in what manner. If at the time of his death he was a resident of another state, the bill should set forth the facts showing that complainants are entitled to the note sued on under the statutes of distribution of such state."[16]

§ 195. If title by assignment, bill must show assignor's title.—And when the plaintiff's claim is one step further removed, as where he claims as assignee of a distributee, he must show the distributee's title, and that he had the right to assign it.[17] And conversely, when the plaintiff sues to enjoin collection by an assignee of a distributee, he must show clearly the defect in the distributee's title, and that he had no right as against the plaintiff to make the assignment. Thus where two persons who had been co-executors with the defendant's intestate in executing a will, sought to enjoin the defendant from collecting a judgment in the probate court for the dis-

[15] Long, Admr. v. King, 117 Ala. 423.

[16] Hopkins v. Miller, 92 Ala. 513, citing Ballard v. Johns, 80 Ala. 32, the latter, however, an appeal on petition for sale in the probate court.

[17] Bogan v. Camp, 30 Ala. 276.*

tributive share coming to his intestate under the will, and charged that the defendant's intestate had received moneys from the estate not credited on his distributive share, the court held the bill demurrable for not averring that the plaintiffs had been charged on their settlement with the amounts received by the defendant's intestate; or in lieu thereof, that the defendant's intestate had not settled his accounts before his death, and that the plaintiffs as co-executors with him, were his sureties.[18]

§ 196. Where equity dependent upon wording of a writing wording must be set out.—Sometimes the exactness with which a title is set forth may be more important that at other times. Thus where the equity of a bill rests upon title under a will, the equity is dependent upon the wording, and the clause of the will sought to be construed should be set out in haec verba.[19] But where the equity rests upon a deed, as in a bill to enforce a vendor's lien upon land, the question is one of identity of the land only, and all that is necessary is to describe the land with reasonable certainty, so that the decree of sale will not be taken to foreclose a lien on the wrong land.[20] Therefore, unless the terms of a conveyance are involved, the fact of a conveyance is sufficiently alleged when the charge is made that "Mary C. did convey" with or without a statement of the grounds upon which it was based.[21]

§ 197. Bill must show plaintiff's right to sue.—Next, assuming that the plaintiff sufficiently sets forth his title or interest in the subject matter, he must set forth the facts which show a right in him to bring it before the court. Thus a cestui que trust, seeking to enforce his rights as a beneficiary, must allege that the trustee has refused to sue, and that he is therefore compelled to bring the suit in his own name;[22] and a stockholder suing to enforce a corporate claim must show that the directors have refused to bring suit in the name of

[18] Duckworth v. Duckworth, 35 Ala. 70.

[19] Goldsby v. Goldsby, 67 Ala. 560.

[20] Neely v. Goodwin, 91 Ala. 604.

[21] Christian v. Am. Freehold Mtge. Co., 92 Ala. 130.

[22] Bailey v. Selden, 112 Ala. 593.

the corporation.[23] And it is held that a foreign corporation seeking to enforce a contract or foreclose a mortgage, must allege that it has complied with the constitutional and statutory provisions authorizing it to do business in Alabama.[24]

But a bill by a corporation to establish a title to land need not allege that the plaintiff under its charter could hold real estate,[25] nor need a bill to foreclose a mortgage by a corporation allege that the proper meetings of the shareholders were held and the proper notice thereof given, in order that the mortgage be properly executed.[26] Nor need a bill to enforce the payment of a debt for the purchase price of liquors allege that the plaintiff had a license to sell them.[27]

§ 198. Bill must show that suit is not premature.—Next, it is necessary for a bill to show that the plaintiff is not premature in bringing his suit to the court; that his suit is properly timed.

Mr. Daniell says that an executor cannot file a bill without alleging that the will under which he is acting has been properly probated and naming the court in which the probate was made;[28] and while there seems to be no Alabama decision in point, it is doubtless law here also. And an administrator certainly cannot file a bill as such without alleging that he was duly appointed administrator in some named court, giving the time when letters were issued to him.[29]

So a suit to compel a final settlement of an estate, must show that the estate is ready for final settlement;[30] and a suit seeking a sale for distribution of the assets of an estate must

[23] Tuscaloosa Co. v. Cox, 68 Ala. 71; Nathan v. Tompkins, 82 Ala. 437; Tutwiler v. Tuscaloosa Co., 89 Ala. 391.

[24] Sullivan, Receiver v. Vernon, 121 Ala. 393. Ginn v. New Eng. Mtge. Sec. Co., 92 Ala. 135; Christian v. Am. Freehold Mtge. Co., 89 Ala. 198.

[25] Torrent Fire Engine Co. v. City of Mobile, 101 Ala. 559.

[26] Nelson v. Hubbard, 96 Ala. 238.

[27] O'Niell v. Birmingham Brewing Co., 101 Ala. 383.

[28] 1 Daniell Ch. Pr. 363, 364.

[29] There are certain cases, however, where a plaintiff who has been removed from administration can file a bill to transfer the administration of an estate into chancery for equities connected with his past administration. Norton v. Norton, 94 Ala. 481.

[30] Acklen v. Goodman, 77 Ala. 521.

show that the requisite time has elapsed within which claims against the estate may be filed.[31]

§ 199. Proper fullness a matter of common sense.—Upon reflection it will appear that the fullness with which preliminary facts leading up to the gist of the action must be set forth, is a matter of common sense. The decisions say that the bill must not set forth the mere conclusions of the pleader,[32] and on the other hand, the bill must not allege mere evidence.[33] But barring the most elementary phenomena or actions occurring before the plaintiff's eyes, many things which he would conscientiously state as facts are either conclusions or evidence. Thus an allegation that Mary C. executed a deed purporting to convey her interest, "and the plaintiff avers that said deed did convey her interest" is made up of conclusions only; and yet it was held sufficient.[34] And in discussing the manner of setting forth fraud it is said that "general averments of facts, from which, unexplained, a conclusion of fraud arises, are sufficient."[35]

§ 200. Rule stated by Supreme Court.—So probably the only general rules for guidance which can be laid down for the pleader are those stated by Mr. Justice Sharpe in a recent case[36] as follows: "In McKinley v. Irvine, 13 Ala. 693, this court stated as a rule of equity pleading 'the complainant must show by his allegations in the bill that he is entitled to the relief which he seeks, and if he fails to set forth every essential fact necessary to make out his title to maintain the bill the defect will be fatal.' In Cockrell v. Gurley 26 Ala. 405, it was said to be a rule of universal application in equity as at law that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the de-

[31] Jackson v. Rowell, 87 Ala. 685.

[32] Cameron v. Abbott, 30 Ala. 416; Lipscomb v. McClellan, 72 Ala. 151; Scholze v. Steiner, 100 Ala. 148, 152.

[33] Cabbell v. Williams, 127 Ala. 320; Hall and Farley v. Henderson, 126 Ala. 449, 484; Williams v. Spragins, 102 Ala. 424.

[34] Christian v. Am. Freehold Mtge. Co., 92 Ala. 130.

[35] Williams v. Spragins, 102 Ala. 424, 430.

[36] Overton v. Moseley, 135 Ala. 599.

fendant to be distinctly informed of the nature of the case he is called to defend. These rules have been generally recognized and upheld."

Beyond this the pleader will have to be guided by his own judgment as to what he should allege.

§ 201. Examples of decisions.—A creditors' bill must set forth the character of the demands sought to be enforced, "whether evidenced by writing signed, or existing in open account, and when due."[37]

Where a bill seeks to enforce a contract dependent upon the time when the contract was made, the bill must give the time, or the court will presume that the contract was not made at the proper time.[38]

Where a bill is filed by a railroad to get the benefit of a right of way granted in a deed and occupied by defendant, the bill must show that the plaintiff falls within the class intended to be benefitted by the deed, and that there was space in the right of way at the time of filing the bill, on which the plaintiff might build a parallel track.[39]

And where bills rest upon corporate charters, or other private Acts of the legislature, the Acts should be set out, described, or attached to the bills as exhibits.[40]

§ 202. Defenses need not be negatived.—But matters which do not vitiate a transaction unless set up as defenses, of course need not be negatived by allegations in the bill. Thus a bill seeking specific performance of a contract need not allege that the agreement was in writing so as to comply with the statute of frauds.[41] Nor need a bill allege that the plaintiff was licensed to engage in the business the contract for which he seeks to enforce; nor that the contract was not made on a sabbath day.[42]

[37] Gibson v. Trowbridge Furniture Co., 93 Ala. 579.

[38] Reel v. Overall, 39 Ala. 138.

[39] S. & N. R. R. Co. v. Highland Ave. & R. R. Co., 117 Ala. 395.

[40] Perry v. N. &c. R. R. Co., 55 Ala. 413; McDonald v. Mobile Life Ins. Co., 56 Ala. 468.

[41] Knox v. Childersburg Land Co., 86 Ala. 180.

[42] Nelms v. Edinborough Am. Land Mtge. Co., 92 Ala. 157; McCurry v. Gibson, 108 Ala. 451.

§ 203. How fraud alleged.—How fraud should be alleged in a bill seeking relief where fraud is the gist of the cause of action, requires some special mention.

In England it seems to have been unnecessary for the bill to contain anything more than a general allegation of fraud or collusion in order to shut out a demurrer, although Lord Eldon pointed out the great injustice to the defendant of requiring him to take issue upon such generalities.[43]

But in Alabama it has long been settled that "fraud is a conclusion of law from facts stated and proved. When it is pleaded at law, or in equity, the facts out of which it is supposed to arise must be stated: a mere general averment, without such facts, is not sufficient. The court cannot on such averment, pronounce judgment."[44]

The sense of this ruling is made clear by the following language of the Supreme Court in relation to that most common form of fraud, the conveyance by a debtor of his property with the intent to hinder and defraud his creditors: "In many such cases such an intent is an essential predicate to relief; but the existence of this intent cannot under our law be proved or disproved by the oath of the party to whom it is imputed: it is not a fact about which he can directly depose. In the nature of things, none other than such a party can affirm directly that it did or did not exist at the time under inquiry. So that in all cases its existence vel non is a matter of inference to be drawn from the facts and circumstances surrounding and characterizing the transaction." [45]

§ 204. Rules as to fraud given in decisions.—But while it is from the facts only that fraud must be shown, it is true of fraud as of every other conclusion that "general certainty is

[43] 1 Daniell Ch. Pr. 375.

[44] Per Brickell, C. J. in Flewellen v. Crane, 58 Ala. 627. This statement of the law for pleading fraud in chancery was quoted and followed in Pickett v. Pipkin, 64 Ala. 520; Renolds v. Excelsior Coal Co., 100 Ala. 296; and Steiner v. Parsons, 103 Ala. 215. It was also cited with approval in Lipscomb v. McClellan, 72 Ala. 151, and Scholze v. Steiner, 100 Ala. 148.

[45] Per McClellan, J., in Coal City Coal & Coke Co. v. Hazard Powder Co., 108 Ala. 218. And see Kidd v. Josiah Morris & Co., 127 Ala. 393.

sufficient in pleadings in equity; and though a mere general charge of fraud is insufficient, it is not to be understood that the particular facts and circumstances which confirm or establish it should be minutely charged." [46] "General averments of facts, from which, unexplained, a conclusion of fraud arises, are sufficient." [47] And the requirements seem to have been finally stated by Mr. Justice Haralson in explaining that the plaintiff "is not bound to aver all his matters of evidence tending to establish fraud, but he must show, with accuracy and clearness, matters essential to his right of recovery, and these must not be left to depend on inference or on general or ambiguous averments. The test of the sufficiency of such averments is, not whether they might not have been more direct and full in the statement of facts out of which the conclusion of fraud arises—for these are not required to be minutely alleged; but whether they are sufficient to notify the defendants that the bona fides of the transactions are assailed, and to put in issue their validity." [48]

§ 205. Pleadings taken strongest against pleader.—It is a fundamental rule at equity as well as at law that pleadings must be construed most strongly against the pleader; and this applies to the averments of the bill.[49] Nor is it the duty of the court to form the pleadings for the litigants; the equity of the bill will be considered from the facts as the plaintiff presents them.[50] He is presumed to state his best case, and no advantage can be drawn from vague and indefinite allegations.[51]

§ 206. Equity of bill not affected by immaterial matters.—But if sufficient averments are made to show equity on the facts, the equity of the bill will not be affected by conclusions

[46] Per Brickell, C. J., in Pickett v. Pipkin, 64 Ala. 520.

[47] Per Clopton, J., in Burford v. Steele, 80 Ala. 147.

[48] Williams v. Spragins, 102 Ala. 424. The opinion then adds the words of Clopton, J., quoted above. See also Seals v. Robinson, 75 Ala. 363, for a discussion what the facts must show to be fraud.

[49] Strickland v. Gay Hardie & Co., 104 Ala. 375; Lewis v. Mohr, 97 Ala. 366; Stubbs v. Leavitt, 30 Ala. 352; Lockhard v. Lockhard, 16 Ala. 423.

[50] Smith v. Teague, 119 Ala. 385.

[51] Underhill v. Mobile Fire &c. Co., 67 Ala. 45.

of the pleader or any number of additional immaterial allegations.[52] Uncertain immaterial allegations are not even ground for demurrer[53] although, as we shall see, they may be objected to, if long, for rendering the bill prolix. The bill should allege, however, every material fact upon which the plaintiff purposes to offer evidence.[54] And it is not an objection that the bill alleges more facts than necessary, so that the grounds for relief are cumulative.[55]

§ 207. Bill need not show nature of proof.—It is not required of the plaintiff to state in his bill what method he will pursue to prove the facts which he alleges. Indeed he is frequently undecided at the time of the filing of the bill, whom he will select as witnesses. The very best evidence is the proved admissions of the opposite party; and of course it is unnecessary to allege in the bill that such admissions have been made.[56]

§ 208. Statements on information and belief.—But it not infrequently happens that some important fact or set of facts in the plaintiff's case are entirely outside his own knowledge although his informant is so trustworthy that he is willing to rest his case upon the truth of his statements. As the statements must be positive, a conscientious plaintiff, not wishing to state of his own knowledge is bound to qualify the statement, so that if by any mischance his informant should prove to be wrong, he himself will not have been guilty of writing out a falsehood. So he makes the statements "on information and belief."[57] But while it is perfectly legitimate to so indicate his reliance upon others for his facts, the pleader must be

[52] McDonnell v. Finch, 131 Ala. 85.

[53] Caple v. McCullom, 27 Ala. 461.

[54] Savannah & Memphis R. R. Co., v. Lancaster, 62 Ala. 555.

[55] Worthington v. Miller, 134 Ala. 420; Noble v. Moses, 81 Ala. 530, 548.

[56] Bishop v. Bishop, 13 Ala. 475; Brandon v. Cabiniss, 10 Ala. 157.

[57] "As to facts not within his own knowledge, it would be impossible for a conscientious complainant to do otherwise." Per Chilton, J., in Read v. Walker, 18 Ala. 323, 332; Story Eq. Pl. § 256; Nix v. Winter, 35 Ala. 309. As the pleader at common law never had such compunctions of conscience for alleging matters wildly in his declaration, it would seem that the habit in equity comes rather from caution in making statements in bills which are sworn to, of matters of which the

careful that the statement itself is positively made.[58] By carelessness of expression bills have been rendered bad by such methods of statement as, "Your orator saith that he is advised and believes that," etc.,[59] Your orator is informed,"[60] and similar incomplete expressions which in fact state nothing positively, and leave the defendant to deny not the fact, but the fact that the plaintiff is informed and believes.[61] The full expression approved by the Supreme Court is that the plaintiff "has been informed and believes and upon such information and belief charges the fact to be," etc.[62]

§ 209. Double aspect, or alternative averments.—It sometimes happens that the plaintiff has two grounds upon which he would be entitled to relief, but he is doubtful which of them will be sustained by the evidence. We have just seen that it would not hurt his bill to set forth cumulative grounds; but it may be that the facts constituting one ground are exclusive but not necessarily contradictory to those constituting the other. Thus if he is seeking to set aside a deed, he may have evidence that the grantor was insane, and also evidence that the grantor was imbecile, and perhaps evidence that the grantor was subjected to duress. While there is considerable doubt whether it was generally allowable to set up an uncertain state of facts in old English practice, since the English text books do not distinctly say so, the practice has grown in America until it is clearly now allowable to so frame the bill to meet a state of the evidence capable of sustaining any one of the above conclusions.[63] It is called framing the bill in a double aspect, or with alternative averments.

§ 210. Distinguished from prayers in alternative.—The use of such terms has caused much confusion with what was

plaintiff is sufficiently uncertain not to be willing to subject himself to prosecution for perjury. Compare Burgess v. Martin, 111 Ala. 656.

[58] Lucas v. Oliver, 34 Ala. 626.

[59] Jones v. Cowles, 26 Ala. 614.

[60] Cameron v. Abbott, 30 Ala. 416.

[61] In Ex parte Reid, 50 Ala. 439, the court would seem to have been in error in holding that the wording, "Your petitioner was, as he is informed and believes, and thereon states," does not state positively. But it was not a bill in equity.

[62] Burgess v. Martin, 111 Ala. 656.

[63] Story Eq. Pl. § 254.

known in English practice as praying in the alternative, which was likewise called framing the bill in a double aspect;[64] but the English use of the term seems to have referred only to the use of several special prayers.

§ 211. Conditional alternative averments.—It is even allowable now, if the plaintiff is uncertain which of two conditions of the facts may be true, for him to state one condition of facts, and then say that if he is mistaken about that being true, then certainly another condition of the facts is the truth. Thus in a bill to redeem from a mortgage, he may say that the mortgage debt has been paid, or if it has not been entirely paid, that he now stands ready to pay any part of it that may be still due.[65]

§ 212. Examples of decisions.—And it has been held that a bill seeking to set aside a sale under a mortgage may allege that the plaintiff had an agreement with the mortgagee that he would buy it in for the plaintiff; and then to avoid the effect of failure to prove the agreement, set forth also the facts constituting the statutory right of redemption granted to the plaintiff by law.[66]

And it has been held that a creditor's bill seeking to set aside conveyances by the debtor, may allege the facts constituting the conveyances frauds upon the plaintiffs as creditors, and set forth in the alternative the facts which would be sufficient in equity to make the conveyances a general assignment for the benefit of all the creditors.[67]

But this last holding has been since overruled, on the ground that the relief incident to holding the conveyances void as sales by the debtor, was inconsistant with the relief incident to holding them good as general assignments for the benefits of all the creditors.[68]

§ 213. Rule of Supreme Court stated.—The rule now long

[64] 1 Daniell Ch. Pr. 441; "If the plaintiff doubt as to the proper relief, he may frame his prayer in the alternative, to have either one relief or the other, as the court shall decide." Adams Eq. 309.

[65] Fields v. Helms, 70 Ala. 460.

[66] Adams v. Sayre, 70 Ala. 318.

[67] Crawford v. Kirksey, 50 Ala. 590.

[68] Lehman v. Meyer, 67 Ala. 396; Moog v. Talcott, 72 Ala. 210; Heyer v. Bromberg, 74 Ala. 524.

adopted by our court, therefore, for determining when bills are properly framed in this double aspect is that they are properly framed "embracing alternative averments for relief," when "each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each;" and that they are improperly so framed when the different aspects entitle the plaintiff to inconsistent and repugnant reliefs, and are subject to different defenses.[69] And these alternative allegations may be brought in by amendments to the bill, as well as in the original framing of it.[70]

§ 214. History of rule.—It may be doubted, however, whether the rule is not somewhat broader than it would be safe to follow, for most of the cases in which it has been stated are cases which hold the double aspects improper as not complying with the rule. And the history of the rule is interesting. The first Alabama case pronouncing it was Rives v. Walthall's Executors[71] in which A. J. Walker, C. J. said "It is certainly permissible for a complainant to aver in his bill, that either one or the other of two alternative statements is true. Undoubtedly it is so when each of the statements entitles the party to the same relief." But he held that the bill under consideration did not contain such averments. He cites in support of the proposition a dictum by Curtis, J. in the Supreme Court of the United States,[72] which seems to have been founded upon a misconception of an English decision,[73] four earlier Alabama decisions, none of which seems applicable,[74] and three decisions from other states,[75] and

[69] Wimberly v. Montgomery Fert. Co., 132 Ala. 107; Hall & Farley v. Henderson, 114 Ala. 601; Pollak Co. v. Muscogee Mfg. Co., 108 Ala. 467; Globe Iron &c. Co. v. Thatcher, 87 Ala. 458; Caldwell v. King, 76 Ala. 149; Ward v. Patton, 75 Ala. 207; Heyer v Bromberg, 74 Ala. 524; Lehman v. Meyer, 67 Ala. 396; Gordon v. Ross, 63 Ala. 363; Micou v. Ashurst, 55 Ala. 607.

[70] Caldwell v. King, 76 Ala. 149 Ward v. Patton, 75 Ala. 207; Pollak v. Muscogee Mfg. Co., 108 Ala. 467.

[71] 38 Ala. 329.

[72] 17 Howard, 130, 144.

[73] Edwards v. Edwards, Jacob, 335; for a statement of which see Story Eq. Pl. § 246.

[74] Andrews v. McCoy, 8 Ala. 920; Thomason v. Smithson, 7 P. 144; Simmons v. Williams, 27 Ala. 507; and Strange v. Watson, 11 Ala. 324.

[75] Carnegay v. Caraway, 2 Dev. Eq. 405; Lloyd v. Brewster, 4 Paige, 537; Colter v. Ross, 2 Paige 390.

also Mr. Justice Story. The latter sustains his deduction of the proposition from the single English case of Bennett v. Vade,[76] and two of the decisions cited by Chief Justice Walker.

§ 215. History of rule (continued).—Prior to Chief Justice Walker's enunciation of the doctrine Mr. Justice Stone, sitting on the bench at the same time, had stated [77] upon a bill which he reduced to alternative statements of one thing or another, "Without intending, in this opinion, to commit ourselves on the question whether in such a case as this it is sufficient to aver alternatively that the wrong or fraud complained of was perpetrated either by one instrumentality or another, it is manifest, that if such form of pleading be resorted to, under the rule which requires the pleader to show by his pleadings that he has a right to the relief he prays, * * * no relief can be granted, unless each branch of the disjunctive averments set forth a ground for equitable interposition."

§ 216. History of rule (continued).—Evidently Justice Stone did not fully agree with Chief Justice Walker at that time; but the latter's statement was cited to support the decision allowing alternative statements in Crawford v. Kirksey in a bill attacking conveyances for fraud;[78] and the proposition was later several times stated, although to overthrow rather than to sustain bills, in opinions by Chief Justice Brickell;[79] and still later, in Lehman v. Meyer,[80] when the decision in Crawford v. Kirksey upon fraudulent conveyances was overruled, but the proposition upon alternative averments again approved. So when opportunity was presented to Justice Stone in the opinion in Heyer v. Bromberg again to discuss it, it had become too completely established to be disapproved.[81]

[76] 2 Atkyns, 325. Stony Eq. Pl. § 254.

[77] Lucas v. Oliver, 34 Ala. 626.

[78] 50 Ala. 590.

[79] Micou v. Ashurst, 55 Ala. 607; Ala. Warehouse Co. v. Jones, 62 Ala. 550; Gordon v. Ross, 63 Ala. 363.

[80] 67 Ala. 396.

[81] 74 Ala. 524. It will be noted that Justice Stone did not declare the rule, however, but merely showed that each of the three aspects of the bill in question sought different relief, making the bill subject to demurrer.

§ 217. Rule analyzed.—Of the soundness of the proposition originally laid down by Justice Stone, quoted above,[82] that each of the alternative averments, whether it is proper to plead alternatively or not, must entitle the plaintiff to relief, there can be no doubt whatever. It is a fundamental rule of pleading as well as of common sense that the bill must not make contradictory material averments. "A bill which does not allege a cause of action, cannot be entertained, and there is no sensible distinction between the absence of the necessary allegations showing a cause of action, and an alternative admission that no cause of action exists, as the bill must be construed most strongly against the pleader."[83]

Nor can there be any doubt that the bill is bad when the two alternatives set forth incongruent or inconsistent facts, the sense of this is apparent by applying the test of a decree pro confesso. "Suppose a bill of this character should be confessed by the defendant," said Chief Justice Brickell in Micou v. Ashurst,[84] "what relief would the court grant? Which of the repugnant and inconsistent statements would be adopted?"

Nor can there be any doubt that when the bill alleges two or more entirely different sets of facts not necessarily interconnected with each other, and upon each of which different reliefs is prayed or would have to be given, the bill is multifarious, presents many issues, and requires many defenses

[82] Lucas v. Oliver, 34 Ala. 626. The proposition in this original simple form was again stated by Byrd, J., in David v. Shepard, 40 Ala. 587, and approved by Clopton, J., in Caldwell v. King, 76 Ala. 149.

[83] Per Ormond, J., in Andrews v. McCoy, 8 Ala. 920. If the defendant answers, however, instead of demurring, and thus sets up the real facts, of course the defect in the bill is healed. And the defect cannot then be taken advantage of in the Supreme Court. This was the decision on this point in Andrews v. McCoy, although the case was cited by Chief Justice Walker in Rives v. Walthall, 38 Ala. 329, as sustaining his broader proposition.

In Lockett v. Hurt, 57 Ala. 200, a bill with alternative averments seeking different relief was discussed on other points in the Supreme Court, showing that unless the objection is properly raised in the lower court, the Supreme Court will not take judicial notice of it.

[84] 55 Ala. 607. And see Gordon v. Ross, 63 Ala. 363, and the discussion by Clopton, J., in Caldwell v. King, 76 Ala. 149.

to be set up.[85] This is forbidden by the latter part of the rule as it is declared in the recent decisions.[86]

§ 218. Rule analyzed (continued).—On the other hand there can be no doubt that if the bill sets forth a good title to the relief sought, it will not be rendered bad by alleging additional facts making the right to relief clearer; for that is simply setting forth a cumulative right to relief.[87] Nor would the validity seem to be affected if the additional facts are sufficient to make a cause of action in themselves; as if the plaintiff avers that he is entitled to a piece of real estate as sole heir, and also sets forth a will under which he is devisee. No case has occurred involving this state of facts; but if the defendant happened to have ground to attack the will, it might be that the court would be asked to hold such an alternative averment bad under the rule, as requiring different defenses.

§ 219. Rule analyzed (continued).—In all cumulative allegations, however, the facts are congruous and non-exclusive of each other. So that the only doubtful cases are where the alternative statements of facts are entirely different and to some extent exclusive, so that if one set is true, the other set cannot be true. The rule says that a bill so framed is good if the relief under each statement is substantially the same, and if the defenses are alike to each alternative.[88] And it makes no difference that the bill admits that one statement may be wrong; as where a bill to redeem from a mortgage alleges that the debt is paid, or if not, that the plaintiff stands ready to pay it.[89] It would seem that on decree pro confesso these last bills would give trouble, however.

[85] Heyer v. Bromberg, 74 Ala. 524.

[86] Hall & Farley v. Henderson, 114 Ala. 601; Wimberly v. Montgomery &c. Co., 132 Ala. 107.

[87] Worthington v. Miller, 134 Ala. 420; Noble v. Moses, 81 Ala. 530, 548.

[88] Bills seem to have been sustained in the following cases based upon the rule: Adams v. Sayre, 70 Ala. 318; Hall & Farley v. Henderson, 114 Ala. 601; Wimberly v. Montgomery Fert. Co., 132 Ala. 107.

[89] Fields v. Helms, 70 Ala. 480; Hartley v. Mathews, 96 Ala. 226; Dickerson v. Winslow, 97 Ala. 491; Tipton v. Wortham, 93 Ala. 321; Williams v. Cooper, 107 Ala. 246.

The saving clause of the rule is that the defenses must be the same to each alternative; and it is apparent at a glance that this would exclude many alternative statements; so amidst the uncertainty the pleader must proceed with great caution, and unless the facts present one entire situation, he should avoid subjecting his bill to a searching demurrer unless he can find some decided case in point.

§ 220. Bill must present entire matter in dispute.—There is another important rule of English chancery practice with regard to the matter of the bill which should never be overlooked by a pleader, although it has not been discussed much by the Supreme Court of Alabama. It is that the suit, and therefore the bill, must bring the whole matter in dispute before the court, so that litigation upon the subject shall be final. The plaintiff will not be permitted to bring his claims against the defendant arising out of the same transaction one by one, but must call upon the defendant to settle them all at once.

It can well be imagined how frequently this rule must be applied, and the infrequency of Alabama decisions upon it must be accounted for by the modern tendency at law as well as in equity to combine all claims possible to be combined without being required to do so. Daniell refers to a good many cases where the rule had to be applied; where a beneficiary had claims against a trustee under two estates, and in seeking an account against the trustee was not allowed to sue for accounts upon the estates separately; where a mortgagor had made to the same mortgagee a first and additional mortgages upon the same property, and was not allowed to redeem from one without redeeming from the other mortgages also; and Daniell refers to other instances of double indebtedness which must be settled in equity at once.[90]

§ 221. Partnership affairs one matter.—The commonest case to which the rule is applicable is the one in which it happens to have been reiterated in Alabama; it is that a partner, or the representative of a deceased partner, will not be allowed to file a bill to enforce one item of a partnership contract alone;

[90] 1 Daniell Ch. Pr. 379, et seq.

but if he sues at all, must sue for a settlement of the partnership affairs and a general accounting.[91] The applicability of this case depends primarily upon the old principle of the law of partnership, that no matters growing out of the relation of partners will be inquired into by the courts at the suit of one partner except upon a bill to settle the whole partnership affairs.[92] The historical reason for this principle of the law of partnership need not be enquired into here. But the fact of its existence makes every point in dispute between partners upon their affairs only a partial matter.

§ 222. Administration of estate one matter.—Another principle established in Alabama is that the administration of the estate of a decedent is one whole matter. So when an estate is taken into chancery the setting aside of dower and homestead are all carried with it.[93] Therefore a bill seeking to transfer the administration from the probate court into the chancery court or seeking to obtain the jurisdiction of the chancery court upon one part of the administration of the estate, would amount to asking the chancery court to consider only a part of the subject matter in question. No decision has held this yet; but it would seem that such a decision is to be expected when the matter shall be presented. It was held in the chancery court in Jefferson County in the cause of L. A. Roy v. C. N. Roy, et als. (and no appeal was taken upon the decision), that a bill by an heir to remove the administration of an estate into chancery when there were pending in the Probate Court of Jefferson County separate petitions for dower and homestead, was not subject to demurrer for not expressly praying the setting apart of dower and homestead by the chancery court; and the chancery court received a transcript of the said petitions from the probate court, and proceeded under them as part of the chancery cause. This decision was the converse of Tygh v. Dolan,[93] which held on an appeal from the probate court that the transfer of the administration of an estate into chancery could be

[91] Haynes v. Short, 88 Ala. 562.

[92] McGhee v. Daugherty, 10 Ala. 863; Tutwiler v. Dugger, 127 Ala. 194.

[93] Tygh v. Dolan, 95 Ala. 269. And see Baker v. Mitchell, 109 Ala. 490.

pled in bar to proceeding upon a petition for allotment of homestead in the probate court.

§ 223. Administration of estate one matter (continued).—It may well be doubted, however, whether a bill in chancery to set apart dower pending the administration of the estate of the deceased husband, would be subject to demurrer for not praying the transfer and settlement of the administration of the whole estate in chancery, since the power to make allotment of dower is a distinct branch of equity jurisdiction, without regard to the fact of whether the estate of the decedent is subject to administration or not.[94] The sense of the rule that the whole matter in dispute must be brought before the court at once, is the same as that upon which must rest the rule already stated which requires all the parties interested in a cause to be brought before the court at once, namely, that the performance of the decree which is sought may be rendered "perfectly safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter either at law or in equity."[95] Let this principle then be a guide in determining what matters shall be brought into the bill.

§ 224. Bills must not be prolix.—In the effort to put into the bill all matters connected with the dispute, the plaintiff should be careful that the bill does not lose its conciseness. Section 3094 of the Code of 1907 provides that "The bill must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition * * *; and it is the duty of the courts to discountenance prolix statements and unnecessary and false allegations in all chancery pleadings." A bill must not be padded with elaborate and unimportant details. All the circumstances leading up to and surrounding the matter or transaction made the basis of the suit, should not be presented unless it would vary the relief to which the plaintiff is entitled for them to be omitted. And even the instruments, or orders of court connected with the

[94] Sanders v. Wallace, 114 Ala. 259; Wilkinson v. Brandon, 92 Ala. 530; Brooks v. Woods, 40 Ala. 538; Owen v. Slatter, 26 Ala. 547.

[95] Rule of Daniell as to parties, 1 Daniell Ch. Pr. 241. Compare §§ 123 and 162, ante.

suit should not be set forth from beginning to end, or in haec verba, as it is called, unless they are to be construed or are of such doubtful meaning in their entirety as to require being set forth in full.[96]

§ 225. Prolixity and impertinence.—Such unnecessary matter when it consists of undue prolongation of relevant papers or circumstances may be called prolixity in the pleadings, and when it consists of irrelevant facts or circumstances it is called impertinence. They both probably correspond to what would be classed as surplusage in common law pleadings. Prolixity and impertinence are often very hard to distinguish, but it makes no real difference how an unnecessary recital of matters is classed. The Supreme Court of Alabama seems not to have taken occasion to discuss the subject; so the reader will have to refer to the general text books for full consideration of it.[97]

But the failure of the court to discuss the matter was probable due to the failure of the solicitors to raise these objections to the pleadings. Every practitioner knows many cases in Alabama courts where busy solicitors have choked the record with pages upon pages of certified copies of proceedings and instruments executed by corporations, most of which could have been stated in brief form if the solicitor pleading them had been required to cull out the unnecessary verbiage. An alert solicitor on the other side would have reduced the cost bill by half had he availed himself of his opportunity to object.

§ 226. Pertinence and impertinence mixed: caution should be exercised.—Lord Eldon said that "if pertinence and impertinence be so mixed that they cannot be separated, the whole is impertinent. So a prolix setting forth of pertinent matter is impertinent."[98] But in determining what is impertinent and what is not, Story reminds us that the bill is

[96] In a bill of review for error of law apparent the decree of the court sought to be reviewed must be given in full, however. Goldsby v. Goldsby, 67 Ala. 560.

[97] 1 Daniell Ch. Pr. 399, Story Eq. Pl. §§ 266, 270, and note to § 266, citing other authorities. Story does not recognize any distinction between prolixity and impertinence, calling it all impertinence. Daniell cites several English opinions in which the distinction is taken.

[98] Slack v. Evans, 1 Price 278, n.; 1 Daniell Ch. Pr. 400.

directed to obtaining the defendant's answer to its allegations, as well as to stating the plaintiff's cause. "The plaintiff may therefore state any matter of evidence in the bill, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature, and the extent, and the kind of relief, to which the plaintiff may be entitled consistently with the case made by the bill; or which may legally influence the court in determining the question of costs."[99] Thus, the court must not be too hasty in determining that particular matter is impertinent, although impertinence when undoubted cannot be too severely condemned.

§ 227. Scandal: Daniell's definition.—There is a form of impertinent matter which is doubly to be condemned, and that is what is known as scandal. Daniell defines scandal in equity pleadings as "the allegation of anything either in a bill, answer, or any other pleading, which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous."[1]

But if the crime or the immoral action is a part of the plaintiff's case, of course it is not scandal in his pleadings.[1] Thus it is held that if the ground upon which the plaintiff seeks relief is fraud, the bill must allege the facts clearly and distinctly out of which the fraud is supposed to arise.[2] It may even be doubted whether the plaintiff could recover if he failed to allege in term the bad faith which his evidence sustains. Certainly "relief cannot be granted on facts developed in evidence but not alleged, any more than upon facts alleged and not proved."[3]

And the frequent necessity of alleging gross immoralities by the defendent in bills for divorce at once occurs to the mind.

[99] Story Eq. Pl. § 268.
[1] 1 Daniell Ch. Pr. 397.
[2] Reynolds v. Excelsior Coal Co., 100 Ala. 296.
[3] Porter v. Collins, 90 Ala. 510; Park v. Lide, 90 Ala. 246.

§ 228. Objection for scandal, prolixity, or impertinence: how made.—The method of raising objection to scandal, impertinence or prolixity in pleadings is not by demurrer. With reference to cumulative facts in a bill it has been held that the allegation of more facts than necessary will not prevent a party from obtaining relief.[4] "When a bill truly sets forth sufficient facts to entitle complainant to relief, the pleader may or may not at his option aver additional cumulative facts which only intensify, without varying the principle of relief claimed."[5] And though there may be too many such facts, a demurrer will not lie on account of it.[6] And while the Supreme Court has never passed upon a demurrer to a bill for prolixity or impertinence, the principle of the above quotation is applicable to these defects in the bill also. Moreover in English practice a demurrer would not reach the trouble. Mr. Daniell sustains such ruling on the maxim "utile per inutile non vitiatur."[7]

The 38th Order in English Chancery of May, 1845, created the new practice of requiring the question of scandal or impertinence to be brought up by exception in writing signed by the counsel for the opposite party, describing the particular passages which are alleged to be scandalous or impertinent; and this was followed by an application for an order of reference and proceedings by the master thereon,[8] In the absence of Alabama rules or decisions to the contrary, these English rules of May, 1845, govern the practice with us.[9]

§ 229. Alabama Chancery Rules applicable.—Alabama Chancery Rule 33 in the Code of 1907, provides that a defendant who has excepted to a bill for scandal or impertinence shall not be placed in contempt for want of an answer, until a decision on the exceptions. Alabama Chancery Rule 35 provides that when such exceptions are filed in vacation, the register "shall issue and cause a notice thereof to be

[4] Caple v. McCollom, 27 Ala. 461.

[5] Per Stone, C. J., in Noble v. Moses, 81 Ala. 530, 548.

[6] Worthington v. Miller, 134 Ala. 420.

[7] 1 Daniell Ch. Pr. 401.

[8] 1 Daniell, 401, et seq.

[9] Chancery Rule 7, Code of 1907; Tyson v. Decatur Land Company, 121 Ala. 414.

served on the opposite party, or his solicitor;" and if such party does not submit to the allowance of such exceptions, or fails for five days after service of notice to apply to the register to fix a day for hearing them, the register shall give both parties five days notice of a hearing and then decide the exceptions. An appeal is provided to the chancellor as in other cases of appeals from decisions of the register.

Chancery Rule 38 provides that if the exceptions are taken too near before a term of court to allow five days notice, they shall be heard as early as practicable during the term on one day notice, and in case of an appeal from the register's decision no notice of hearing the appeal is necessary.

And Chancery Rule 37 provides that "should the register allow an exception for scandal or impertinence, he shall draw black lines around such scandalous or impertinent matter, and write across the face thereof with red ink 'expunged'." And "in all cases where a party appeals to the chancellor, all proceedings to obtain a decree pro confesso, or to coerce an answer or to expunge improper matter, shall be suspended until the decision of the chancellor is announced."

These Alabama rules show that a proper way to object to scandal or impertinence in the bill, is by exception as provided by the English Order No. 38; and if any other method is allowable the Supreme Court has not so indicated.

§ 230. Costs occasioned.—Of course the matter expunged, not being thereafter part of the record, cannot add to the costs of the opposite party; but if there is any doubt about it, as well as about the costs of hearing the exceptions, Alabama Chancery Rule 108, which provides that "upon the decision of any interlocutory motion or question, the chancellor may impose such portion of the costs of the suit upon either party as to the chancellor may seem proper," gives the court the right upon motion to that end to correct any failure of the register to lay the costs in the premises at the right door.

CHAPTER VIII.

The Bill (Continued) Multifariousness.

§ 231. Multifariousness defined: new section of Code.—While it is necessary, as we have seen in the last chapter, to incorporate in the bill all matters which constitute component parts of the matter to be brought into litigation by the suit, this has always been limited in Alabama chancery pleading, as well as in English pleading, by a rule that there must not be incorporated in the bill matters so disconnected as to make it a combination of several causes of action. Where the bill presents more than one distinct cause of action for relief, it was always called multifarious, and could be objected to on that ground.

Section 3095 of the Alabama Code of 1907 contains a new provision, however, that "a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction, or relating to the same property between the same parties;" and this new provision has caused so much anxious discussion already by the bar throughout the State, that the subject of multifariousness calls for discussion in a chapter by itself.

§ 232. In English practice three kinds of multifariousness: first kind.—It is best to determine first what constituted multifariousness in English pleading, then under the decisions of the Supreme Court of Alabama prior to the new statute; and then the new statute can be construed in full light of the law affected by it.

Even under English practice it was very difficult to define multifariousness. "According to Lord Cottonham," says Daniell,[1] "it is utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable." But notwithstanding the great number of particular cases in which the judges had doubts whether multifariousness existed

[1] 1 Daniell Ch. Pr. 384.

or not, one great judge often reversing another on appeal, the courts undoubtedly recognized on principle three kinds of multifariousness. The first is the one most commonly known to us as multifariousness, although Daniell says it is in fact more properly misjoinder of causes; that is to say, where "the cases or claims united in the bill are of so different a character, that the court will not permit them to be litigated in one record." The simplest example is cited by the Vice-Chancellor in Attorney-General v. The Goldsmiths' Co.[2] as follows: * * * "There is a rule arising out of the constant practice of the court that it is not competent where A is sole plaintiff and B is sole defendant, for A to unite in his bill against B all sorts of matters wherein they may be mutually concerned. If such a mode of procedure were allowed we should have A filing a bill against B praying to forclose one mortgage, and in the same bill praying to redeem another, and asking many other kinds of relief with respect to many other subjects of complaint."

§ 233. Second kind of multifariousness.—The second kind is what Daniell calls multifariousness proper, namely, "where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."[3] Or stated more concisely this kind of multifariousness is "where a plaintiff demands several matters of different natures of several defendants by the same bill."[4]

§ 234. Third kind of multifariousness.—The third kind of multifariousness is where several persons having distinct claims attempt to join in one bill, the kind which has already been referred to under the head of misjoinder of parties plaintiff.[5] Daniell says, "as a bill by the same plaintiff against the same defendant for different matters would be considered multifarious, so, a fortiori, would a bill by several plaintiffs, demanding distinct matters against the same defendants."[6]

Although many English judges have held that apparently

[2] 5 Simons, 670.

[3] 1 Daniell Ch. Pr. 385.

[4] 1 Daniell Ch. Pr. 393, citing Lord Redesdale

[5] Sec. 171, ante.

[6] 1 Daniell Ch. Pr. 395; Story Eq. Pl. § 272, and English cases cited.

distinct matters involved but one common interest; and have held that a given suit had but one single object, although persons with separate interests were called in, none of them would probably have cited a case of multifariousness that would not fall under one of the above three classes. And let the student not be misled by finding that some leading English authority, for instance, Lord Redesdale, did not admit all the above kinds of multifariousness, but limited the application of the term to class two.[7]

§ 235. Alabama definitions.—Now to consider what constituted multifariousness in Alabama practice prior to the change made by the Code of 1907. In the first decision of the Alabama Supreme Court upon multifariousness, Kennedy's Heirs and Executors v. Kennedy's Heirs, 2 Ala. 571, at page 609, a definition was attempted; and the court, apparently through an early edition of Story's Equity Pleading, seems to have stumbled at Lord Redesdale's limitation, "The objection of multifariousness, it is said must be confined to cases, where the case of each defendant is entirely distinct and separate in its subject matter from that of the other defendants." This is the second kind of multifariousness distinguished above.

The next case to lay down a rule was in 9 Alabama,[8] in which it is said, "The rule, as recognized in this court is, that the bill [to be multifarious] must set forth several distinct matters, perfectly unconnected, or where the case of each defendant is entirely distinct and separate in its subject matter, from that of the other defendants." Thus the court recognized kinds one and two of multifariousness; and the decision was that the bill in the case at bar was bad because of kind number one. The court then added that, "in like manner, if B was the sole defendant to this bill, it would be obnoxious to the exception that the complainants were improperly joined. One object of the bill is to compel him to account for the profits of the trust estate received and converted by him; and these, according to the showing of

[7] Lord Redesdale, 182.

[8] Colburn v. Broughton, 9 Ala. 351, citing, however, Chapman v. Chunn, 5 Ala. 397, which seems to recognize the first kind of multifariousness, but holds the case at bar not included in it.

the bill itself, were belonging to Mrs. C. alone, without the slightest interest whatever being vested in her children, her co-complainants. Where parties are joined as co-complainants who have no interest in the matter in controversy, the bill is bad on demurrer."

This latter defect which is the third kind of multifariousness, was not there so called, but in a case in 37 Ala.[9] a bill so framed was called multifarious; so we find all three kinds of multifariousness found in English practice recognized in Alabama.

In the case last cited kind three was clearly defined as follows: "The bill does not make out a case of any community of interest in the two complainants, but is designed to enforce rights distinct, unconnected, and having no relation to each other, and not such as to make it even a matter of convenience to consider them together. Such a bill is multifarious."

§ 236. Chief Justice Brickell's definition.—Few other definitions of multifariousness seem to have been given by the Supreme Court until Chief Justice Brickell in 116 Ala.,[10] paraphrasing Story, said, "It is said that multifariousness, as an objection to a bill, is not capable of accurate definition. It is described generally, as the joinder of distinct and independent matters, thereby confounding them; or the uniting in one bill of several matters, perfectly distinct and unconnected against one defendant; or the demand of several matters of a distinct and independent nature against several defendants in the same bill." By comparison with the paragraph cited from Story's Equity Pleading[11] it is apparent that the definition was intended to cover all three kinds of multifariousness.

[9] Bean v. Bean, 37 Ala. 17.

[10] Truss v. Miller, 116 Ala. 494, 505. In Burford v. Steele, 80 Ala. 147, Clopton, J., said "The general rule relating to multifariousness, forbids that several and distinct matters, wholly unconnected, or that defendants against whom the complainant asserts separate demands, the case of each defendant being entirely distinct in its subject matter from that of his co-defendants, shall be joined in the same bill."

[11] Story Eq. Pl. § 271, et seq.

Since Chief Justice Brickell's classification none other seems to have been attempted. But each of the three kinds of multifariousness has been recognized by many of our Supreme Court decisions.[12] So we may conclude that in general multifariousness in Alabama and multifariousness in England were the same prior to the enactment of the new Alabama Code of 1907.

§ 237. New statute applies to first kind only.—We are now ready to consider the effect of the new law in the Code of 1907 upon the subject. It is the latter part of section 3095 and is as follows:—"A bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction, or relating to the same property between the same parties."

The last phrase, " between the same parties," evidently must be considered as applying to each of the preceding terms "same subject matter" and "same contract or transaction," as well as to the term "same property," because there could not be a "same contract" between different parties, and if it qualifies one of the separate terms of course it qualifies both.

It is clear then that the new statute does not affect multifariousness of the second kind, arising from joining claims

[12] The first kind of multifariousness, that of combining more than one distinct cause of action in the bill, though between the same parties, was held a defect in the bill in the following cases: Colburn v. Broughton, 9 Ala. 351; Seals v. Pheiffer, 81 Ala. 518; Tillman v. Thomas, 87 Ala. 321; Banks v. Speers, 103 Ala. 436; Prickett v. Prickett, 147 Ala. 494; and was recognized by dictum often. The second kind of multifariousness, that of combining causes against different defendants not interested in common, was held a defect in the bill in the following cases: Waller v. Taylor, 42 Ala. 297; Hardin v. Swope, 47 Ala. 273; Seals v. Pheiffer, 77 Ala. 278; American Refrigerating &c. Co. v. Linn, 93 Ala. 610; Harland v. Person, 93 Ala. 273; Page v Bartlett, 101 Ala. 193; and was recognized in many others holding that given facts did not constitute multifariousness. The third kind of multifariousness, that of joining plaintiff's who had different causes of action against the same defendants, was recognized as a defect in the bill in the following cases: Bean v. Bean, 37 Ala. 17; Mobile Savings Bank v. Burke, 94 Ala. 125; Smith v. Smith, 102 Ala. 516; and has been repeatedly recognized in dicta.

against several defendants not interested in common; nor does it effect multifariousness of the third kind, arising from joining claims by several plaintiffs not interested in common. Further consideration of multifariousness in classes two and three will be postponed, therefore, until the multifariousness of class one and the effect of the new statute upon it, has been disposed of.

§ 238. Inconsistent alternative averments not multifariousness.—It will be recalled that the first kind of multifariousness was recognized as a limitation upon the power of framing bills with alternative averments; so that its recognition in Alabama is supported by the long line of authorities declaring the rule for pleading in the alternative. The last part of the rule was, "if the causes of action presented by the alternative averments, are so distinct as to require inconsistent and repugnant reliefs, and different defenses, the bill is demurrable on the grounds of multifariousness."[13] One feature of the latter rule, however, has been changed by the Supreme Court; it was formerly held, as stated in the rule, that alternative inconsistent averments made the bill multifarious when they were directed to different relief, and could be objected to on that ground.[14] It has since been held, however, that inconsistent averments render the bill defective without regard to multifariousness;[15] and that very properly, because on a decree pro confesso, the bill with contradictory averments could sustain no final decree, the court being unable to tell which set of facts are confessed. The importance of the distinction lies in the fact that by statute, objection for multifariousness is waived unless taken by demurrer.[16]

§ 239. Inconsistent conclusions multifariousness. — But if the inconsistency lies in the different conclusions sought to be placed upon the facts, as in case of alleged fraudulent

[13] Hall & Farley v. Henderson, 114 Ala. 601, 610. And see §§ 213, 217 ante, and authorities cited upon that rule.

[14] Tatum v. Walker, 77 Ala. 563; Williams v. Cooper, 107 Ala. 246.

[15] Ellis v. Crawson, 147 Ala. 294; Long v. Mechem, 142 Ala. 405. And see Taylor v. Dwyer, 131 Ala. 90, 109.

[16] Code of 1907, sec. 3095, brought down from Code of 1886.

transactions, which the plaintiff seeks to have annulled for invalidity apparent, or to have set aside for fraud, or to have interpreted as amounting to a general assignment for the benefit of all creditors, then it would seem that the inconsistency is really brought about by the prayers only, and a decree pro confesso would not admit the fraud, especially if fraud is, as is held, a conclusion of law.[17]

In those cases the later decisions of the Supreme Court upon inconsistent averments could not apply, and so far as those decisions are concerned the defect would remain multifariousness, and would be waived unless raised by demurrer.[18]

§ 240. Alternative prayers alone not multifariousness.—We must now anticipate a little. When we come to discuss the framing of the prayer of the bill, we shall find that "it sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to pray for; it is therefore not unusual to so frame the prayer that if one species of relief sought is denied, another may be granted."[19] As said by Justice Clopton in Lyons v. McCurdy, "An alternative prayer does not, of itself, render a bill multifarious,"[20] provided "each kind shall be consistent with the case made by the bill." Now apply the words of Justice McClellan in a later case, if "the averments of the bill are not duplex," if "all of them would have been proper, in respect, at least, to the rule against multifariousness, had there been only one and either one, of the special prayers" * * * "multifariousness cannot be predicated solely upon the variant prayers with which a bill may conclude."[21]

It is even harmless to pray in the alternative for relief based upon the proof of only part of the facts alleged as ground for the first relief, provided the remaining facts if proven would not contradict the effect of the facts upon

[17] See § 203 ante.

[18] Tillman v. Thomas, 87 Ala. 321; Taylor v. Dwyer, 131 Ala. 90, 109. See also § 213, et seq. ante, and cases cited.

[19] 1 Daniell Ch. Pr. 441.

[20] Lyons v. McCurdy, 90 Ala. 497.

[21] Florence Gas &c. Co. v. Hanby, 101 Ala. 15, at p. 27, citing Lyons v. McCurdy.

which the second relief is based.[22] And it is evidently on the assumption that payment of a part of a debt is part of the truth of the allegation of payment of the whole debt, that it is allowed to file a bill for equitable relief against a mortgage, alleging that the debt is fully paid, or if not, that the plaintiff stands ready to pay any balance remaining due, the plaintiff's title to relief being based in each alternative upon the equity of redemption.[23]

§ 241. Alternative prayers on inconsistent conclusions.—But if the relief sought by one alternative prayer be predicated upon a construction of the facts inconsistent with that upon which the other alternative prayer is based, prior to the enactment of the new section of the Code of 1907, the bill would become multifarious. Thus in Williams v. Cooper,[24] the plaintiff, a married woman filed her bill to cancel a mortgage upon her real estate as a cloud upon her title, alleging that she had become surety for her husband, and that the debt for which the real estate was mortgaged was wholly her husband's debt, it being the law in Alabama that a woman cannot become surety for her husband. Then the bill presented in the alternative, if she was mistaken in the statement that the debt was wholly that of her husband, that so far as the debt was her own, it had been discharged; and if it had not been fully discharged to the extent of her liability, she prayed for an account, and to be let in to redeem. And the court held that the mortgage could not be void as securing her husband's debt, and good as securing her own; so that the bill was multifarious.

It will be noted that in that case the alternative prayer was coupled with a short conditional averment of payment of the debt if the first conclusion upon the facts were not found to be true; but the decision was not rested upon the fact of the two alternative averments with different prayers, but upon the inconsistency of the two positions.

[22] The second alternative in Lyons v. McCurdy, 99 Ala. 497, seems to have been based upon the truth of part of the facts only.

[23] Fields v. Helms, 70 Ala. 460; Dickerson v. Winslow, 97 Ala. 491.

[24] 107 Ala. 246.

§ 242. Tatum v. Walker.—One of the decisions, cited, however, comes up to the point of holding that inconsistent conclusions prayed to be taken upon the same set of facts will render the bill multifarious. In Tatum v. Walker,[25] "The controlling purpose of the bill," says Chief Justice Stone, "was to have declared inoperative and void an alleged crop lien and mortgage, made by Menefee Tatum and wife to the other defendants conveying real and personal property to secure an alleged indebtedness from Menefee Tatum and wife to Tatum Brothers." * * * "The gravamen is that at the time the crop lien and mortgage were executed, Menefee Tatum had lost his reason, and was mentally incapable of making a binding contract. An amendment of the bill was prayed for and allowed." "The amended bill then proceeds with minute particularity to set forth the facts which were generally and briefly charged in the original bill, and repeats the averment that, at the time the crop lien and mortgage were executed Menefee Tatum was mentally incapable of making a binding contract. * * * It prays, also, that the conveyance be declared void, and set aside as a cloud on the title. Up to this point, there is no material repugnancy between the original and amended bill. The amended bill then proceeds in the following language: 'if orator and oratrix are mistaken in praying for this relief [declaring the conveyance void], that defendants be required to account for the proceeds of the sale of the personal property,' and that it be referred to the register to determine how much was still due upon the debt."

There was a demurrer to the amended bill assigning as a ground that "it made a new case" and Chief Justice Stone held that the inconsistent positions made the bill insufficient.

§ 243. Conclusions traced.—The word multifariousness was not used in Tatum v. Walker; nor was it used in the next case approving the decision.[26] But in the next case, which was Williams v. Cooper,[27] we have seen that the defect of

[25] 77 Ala. 563.

[26] Williams v. Jones, 79 Ala. 119.

[27] 107 Ala. 246. Other cases besides Tatum v. Walker, 77 Ala. 563, in which the inconsistency was solely caused by the conclusion sought to be put upon the

inconsistency in the facts with alternate prayers was called multifariousness; and Tatum v. Walker was cited. Then finally came the decision that inconsistent positive statements in the bill though directed to different reliefs are fatal to the bill, but do not constitute multifariousness; which was proper, as we have seen above.[28]

§ 244. Conclusions analyzed.—It is true that it has been held that if no facts are alleged to justify in any respect the alternative prayer, that prayer will be regarded as merely redundant.[29] But a prayer without any color of support could hardly be called a cause of action sufficient to make the bill double; for upon the same principle it has been frequently held that the incorporation in the bill of additional facts together with an alternate prayer directed to obtaining legal relief which is out of the power of chancery to grant, will be disregarded as amounting to mere redundancy.[30] But if stress is laid on these decisions as showing the immateriality of the prayer in considering multifariousness, it has also been held that the allegation of facts directed to relief which might make the bill multifarious, will not affect the bill if not accompanied by a prayer based upon the facts.[31]

§ 245. The prayer a material factor.—We may safely conclude therefore that there is no doubt but that the prayer is

facts by the alternative prayer, were, Lehman v. Meyer, 67 Ala. 396, opinion by Brickell, C. J.; Moog v. Talcott, 72 Ala. 210, opinion by Somerville, J.; Heyer v. Bromberg, 74 Ala. 524, opinion by Stone, J.; Caldwell v. King, 76 Ala. 149, opinion by Clopton, J.; Globe Iron Co. v. Thatcher, 87 Ala. 458, opinion by McClellan, J. In none of them was the defect called multifariousness. but was treated as contradictory alternative pleading. But in the first case, Lehman v. Meyer, Brickell, C. J., discusses the question by stating the rule against multifariousness, and there can be no doubt but that he regarded the defect as such. And see his able opinion in Fields v. Helms, 70 Ala. 460.

[28] Ellis v. Crawson, 147 Ala. 294. See § 238 ante.

[29] Staton v. Rising, 103 Ala. 454.

[30] Wilkinson v. Bradley, 54 Ala. 677; Morris v. Morris, 58 Ala. 443; Baines v. Barnes, 64 Ala. 375; Yarbrough v. Avant, 66 Ala. 526; Johnston v. Little, 141 Ala. 382.

[31] Burford v. Steele, 80 Ala. 147; Juzan v. Toulmin, 9 Ala. 662, 689. Compare Long v. Mechem, 142 Ala. 404.

a very material factor in determining whether a bill is multifarious, and that sometimes it alone has been responsible for the defect. Indeed it has been repeatedly said by the Supreme Court that the whole bill, as well averments as prayer, must be looked to in order to determine the question.[32] Mr. Justice Somerville was probably stating the law incorrectly, then, when he said by way of dictum in McCarthy v. McCarthy,[33] "where a bill is not rendered multifarious by an alternative statement of facts, it cannot be rendered so by an erroneous prayer, invoking some particular relief to which the complainant is shown not to be entitled." It may be that the learned judge was referring only to a prayer which could not be supported by any possible view of the facts. If so, the statement is not contrary to the conclusions above reached. But at all events any weight of the dictum if adverse is overcome by the later decisions just discussed; and taken in the light of the fact that it was made about the same time as the decisions in Tatum v. Walker and other similar cases cited below, it shows that Justice Somerville undoubtedly would have called the contradiction in the bills of those cases multifariousness, although he might not have noticed that the contradiction in them was brought about by the prayers alone.

§ 246. Application of new section of Code.—In this state of the law, then, it would seem that the primary application of the new statute made the last part of section 3095 of the Code, is to that form of multifariousness created in a bill by a prayer in the alternative requiring a conclusion to be placed upon the statement of the facts contradictory or inconsistent to that placed upon them by the first prayer for relief.

[32] Carpenter v. Hall, 18 Ala. 439; "In determining the question of multifariousness, the court can look only to the bill, including the prayer for relief." Per Stone, J. in Wilkinson v. Bradley, 54 Ala. 677; "The demurrer for multifariousness is founded in a misconception of the objects, averments, and prayer of the bill. These are all to be considered in determining whether a bill is multifarious." Per Brickell, C. J., in Ware v. Curry, 67 Ala. 274.

[33] 74 Ala. 546, 556.

In Lehman v. Meyer[34] the plaintiffs, creditors of certain of the defendants, filed their bill to reach personal property subject to levy and sale under execution with allegations that it had been transferred by way of mortgage by the debtors with intent to hinder, delay, and defraud the plaintiffs. "The bill prayed that the mortgages be set aside and declared fraudulent and void, and the property therein conveyed be subjected to the payment of the debts due complainants; that a receiver be appointed to take charge of the goods," &c., "that if the mortgages should be held valid, that they may be declared to operate as a general assignment enuring to the benefit of all the creditors." And on a demurrer pointing out the inconsistency the court held the bill bad.

§ 247. Application of new section of Code (continued).— In Moog v. Talcott[35] the exact allegations of the bill are not given, but it seems to have been similar to that in Lehman v. Meyer, seeking to set aside conveyances by debtors "on the ground that they were executed and accepted with the intent to hinder, delay and defraud their creditors; or in the alternative that the several conveyances be construed together, declared and enforced as a general assignment, enuring to the benefit of all the grantor's creditors equally." A demurrer was overruled, and Justice Somerville held on appeal that the bill was demurrable for inconsistency. He says that the alternative averments as well as the prayers were inconsistent; but it does not appear how the statements of the bill could have been other than single, and Lehman v. Meyer is the principal decision relied upon for support.

In Heyer v. Bromberg[36] the facts were substantially the same and "The prayer for relief was that said sale to F. Bromberg be set aside as void, and the property thereby conveyed be applied to the claim of orators and to the other creditors of Bromberg Brothers who had granted them extension under" a certain agreement; "or if your orators should be mistaken in the belief that they and other creditors are entitled to be paid in preference to said F. Bromberg, then that said bill of sale

[34] 67 Ala. 596.
[35] 72 Ala. 210.
[36] 74 Ala. 524.

be declared a general assignment for the benefit of all the creditors of said Bromberg Brothers."

The decision of the chancellor dismissing the cause was affirmed.

§ 248. Application of new section of Code (continued).— In Caldwell v. King[37] the bill was filed to set aside a conveyance by the debtor to one Conboy "as having been executed on a pretended and simulated consideration in fraud of" the rights of plaintiffs, judgment creditors; "and to have the property condemned to the satisfaction of their judgment." Later an amendment was made reciting that Conboy had given a purchase money note to the debtor, which was held by one Caldwell as part of the fraud, and Caldwell was added as a party. "The prayer of the amendment is that Caldwell surrender the note to the register, and that the proceeds thereof be applied to the payment of complainants' judgment." On appeal from a decree overruling a demurrer by Caldwell, the Supreme Court held the bill bad for inconsistency in seeking to collect the purchase money on a void sale, suggesting the test of a decree pro confesso. It is clear, however, that but for the prayer in the amendment, the added facts affecting Caldwell would not have hurt the bill to set aside the sale.

The next case was Tatum v. Walker, already stated, and then came Globe Iron &c. Co. v. Thatcher,[38] in which the plaintiffs claimed a mechanic's lien ahead of certain mortgages made by the debtor upon the property described in the bill, which they sought to subject to the payment of their debt first.

The bill prayed that the mortgage "be, as to complainant, declared void;" "or, if your Honor finds that complainant has not the lien" claimed, then the plaintiff prayed that the mortgage still be held void, and that all the property thereby conveyed "or so much thereof as may be necessary be sold under a decree" * * * to pay said debt of plaintiff and apparently other bona fide creditors. The decision is that the bill was bad for repugnance and inconsistency.

All these decisions would have been different if they had

[37] 76 Ala. 149.

[38] 87 Ala. 458.

come after the new section of the code; for hereafter "a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction, or relating to the same property between the same parties."

§ 249. Application of new section of Code (continued).—But if the inconsistency is in the allegations of fact, so that the bill itself is contradictory, even if there were no prayers at all, the decision would not be affected by the new enactment; in the first place because upon applying the test of a decree pro confesso, the bill has no positive allegations upon which a decree could be rendered;[39] and in the second place, because the Supreme Court has already held such a defect not to constitute multifariousness any way.[40]

§ 250. Conditional alternative averments: Williams v. Cooper.—The cases hard to construe in the light of the statute are those like Williams v. Cooper[41] where the facts set forth

[39] Micou v. Ashurst, 55 Ala. 607; Gordon v. Ross, 63 Ala. 363; City of Eufaula v. McNab, 67 Ala. 588; Taylor v. Dwyer, 131 Ala. 90; Long v. Mechem, 142 Ala. 45.

[40] Ellis v. Crawson, 147 Ala. 294.

[41] 107 Ala. 247, stated above § 241. In Smith v. Smith, 45 So. Rep. 168, decidedNovember 1907, the court affirmed a decree of the lower court overruling a demurrer to a bill for multifariousness because, "the bill seeks, first, to declare a conveyance absolute on its face a mortgage, and, secondly, to have the conveyance cancelled for fraud practiced by the grantee in procuring its execution." The Court said, "To make a bill multifarious as to subject matters there must be different grounds of suit alleged and each ground must be sufficient to sustain a bill; and while the prayer must also be looked to, in testing the character of the bill, the prayer alone, not supported by averments. though it be for alternative, or different, or inconsistent kinds of relief does not make the bill multifarious." These prayers were undoubtedly based upon inconsistent conclusions upon the facts, in that one assumed the conveyance to be good as a mortgage, and the other assumed it to be void. This decision therefore overruled Williams v. Cooper, 107 Ala. 246, and the line of cases upon which it was based, (see Footnote 27, to this chapter) and also overruled the rule for alternative averments which makes a bill multifarious if the double aspects of the case require different defenses. See Wimberly v. Montgomery Fertilizer Co, 132 Ala 107. None of these cases were noted

in the bill are not presented in contradiction, but the contradictory facts are offered on condition that those first presented are untrue. In that case the plaintiff might well have argued that the allegation of her bill was that the debt securing the mortgage sought to be cancelled was her husband's, that she set forth the alternative that she had discharged it, and the offer to pay any balance due, only on condition that the court should find her first averment, that the debt was her husband's, a mistake; that if a decree pro confesso had been taken, it would have confessed what she would have first set out to prove, that is, that the debt was her husband's; so that there would be nothing contradictory in the facts admitted, the conditional allegations and prayers being merely redundant; and a final decree could follow. If this argument is sound, and the real allegations of the bill are not contradictory, the multifariousness consisted in the incongruity of the reliefs sought in the two alternatives, which was brought out partly by the conditional averment of payment, but chiefly by the second prayer; for if the conditional averment hurt the bill, she might have left that out, and prayed in the alternative for an accounting and redemption in case the proof should fail to show that the debt was wholly her husband's.

in the opinion in Smith v. Smith, but it cites the case of Boutwell v. Vandiver, 123 Ala. 634, from which the language above quoted was taken. Boutwell v. Vandiver, however, did not contain inconsistent prayers: the first sought to cancel the mortgage in question as paid, and the second merely suggested that if not paid the defendents should be decreed to pay it. Moreover that decision is based upon the decision in Rives v. Walthall, 38 Ala. 329, that the second prayer had no averments to support it, and was redundant. The other decisions cited, except Judge Somerville's dictum in McCarthy v. McCarthy, already discussed, do not sustain a conclusion that inconsistent prayers do not make the bill multifarious where they are based upon inconsistent conclusions upon the averments of the bill.

But the decision in Smith v. Smith, was not rendered until Nov. 14, 1907, after the new section 3095 of the Code of 1907 had been enacted into law; so that decision cannot be considered in interpreting that section. If that decision, which was of course unknown to the law makers, made the new section of the Code merely declaratory, it does not preclude such an interpretation being put upon the statute.

Under this argument, which would seem to be sound, Williams v. Cooper was an attempt to combine a suit to cancel the mortgage for the husband's debt with a suit to redeem from the mortgage for the wife's debt, suits which should have been brought separately. But under the influence of the new section of the Code Williams v. Cooper would probably have been decided differently.

§ 251. Inconsistent alternative averments may often be eliminated.—And it may be noted that by skillful presentation of the facts many of the bills which have been dismissed on demurrer as contradictory and incapable of standing the test of a decree pro confesso, could have been so framed that the alternative inconsistent positions would be reconciled, and the alternative relief prayed for merely on condition that certain allegations in the stating part of the bill fail of proof, and without any alternative averments at all. They would then come within the effect of the new statute and would probably be held good.

§ 252. History of conditional alternative averments.—Of course this extension of the statute is dependent upon the court's holding, as suggested above, that an alternative prayer may be based upon the failure of proof of some of the facts as well as upon a different conclusion upon the facts; that to pray in the alternative if certain averments are untrue is not the same thing as to state that they are untrue.[42] And this will be somewhat dependent upon the history of conditional alternative averments, that is, averments that certain matters are true if others are not true.

In Caldwell v. King[43] Clopton J. said in discussing pleading in the alternative, "if [the plaintiff's] title to relief depends upon either the existence or non-existence of a particular fact, or whether it is one way or another, of which he is ignorant, he may make alternative statements, so as to obtain relief if

[42] Compare the alternative prayers in Lyons v. McCurdy, 90 Ala. 497, where the second seems to have been dependent upon some of the facts set forth as the basis of the first prayer being held ineffective, if not absolutely untrue.

[43] 76 Ala. 149.

either statement is confessed, or found to be true." And in Micou v. Ashurst [44] Brickell, C. J., seemed to think that even under such circumstances the plaintiff should allege his ignorance and the necessity for a discovery. But whether that be so or not, the privilege was limited by Clopton, J. to cases where each alternative would entitle the plaintiff "not only to relief, but precisely the same relief;" so that in case of a decree pro confesso being taken, it would be immaterial which alternative was the truth.

§ 253. History of conditional alternative averments (continued).—In Fields v. Helms,[45] however, the first case was presented of a bill praying a redemption from a mortgage averring that the debt was paid, or if not that the plaintiff stood ready to pay it; in the first condition seeking a cancellation, in the second an estimate of the amount due. Brickell, C. J., held the bill to be good, pointing out that the title of the plaintiff in either alternative was the same, and the relief of the same nature and character: for the bill was essentially a bill to redeem. He then stated that the limitation to pleading in the alternative, and to alternative prayers is "that the alternative prayers must not be founded upon inconsistent titles, and the relief must be of the same kind and nature." Of course this does not affect a contradictory statement; for as said above,[46] Fields v. Helms must proceed upon the assumption that a part payment is part of the truth of an averment of complete payment. But it shows that if inconsistency in purpose is not involved, different forms of relief may be sought upon different conditions of proof. And since the new statute the court must hold that inconsistency of purpose in the prayers is legitimate.

§ 254. Improbable applications of the new section.—Now one more possible application of the new statute. Under the rule for setting forth alternative averments as repeatedly affirmed by the Supreme Court it was found that if the alternative averments or aspects or causes of action presented "are

[44] 55 Ala. 607, 612.

[45] 70 Ala. 460. Fields v. Helms was followed in Dickerson v. Winslow, 97 Ala. 491.

[46] § 240 ante.

so distinct as to require inconsistent and repugnant reliefs, and different defenses, the bill is demurrable on grounds of multifariousness.[47]" As the new statute provides that bills shall not be multifarious which seek merely alternative relief, whether inconsistent or not, provided it grows out of the same subject matter, contract, transaction, or property, between the same parties, it is feared by some of the bar that all sorts of rights traceable to a given relation between the same parties may be litigated in one hopelessly confused suit. Thus in Prickett v. Prickett,[48] a wife filed a bill against her husband seeking on different sets of averments to enforce a resulting trust in land, and also to have alimony decreed to her out of his estate. The bill was held multifarious, and yet all the matters doubtless related to the same property which the husband claimed as his own.

§ 255. Improbable applications of the new section (continued).—Of course the Supreme Court will extend the new statute in such dangerous directions only if it finds it unavoidable to do so, but since it is so clear that the statute is applicable to the matters above pointed out and is so beneficial in that direction, it is to be hoped that the court will limit it to that application, and hold that it does not authorize the combining of causes of action arising from different sets of facts, even though they may be between the same parties and grow out of the same subject matter or contract, or relate to the same property.

§ 256. Limitations of first kind of multifariousness.—Having disposed of the effect of the new section of the code, let us now examine a few of the cases limiting the general scope of the three classes of multifariousness identified above.

With regard to the first kind of multifariousness arising from the joinder of distinct claims between the same parties, Story says,[49] "It has never been held as a general proposition that they cannot be united, and that the bill is demurrable for that cause alone, notwithstanding the claims are of a similar

[47] Hall & Farley v. Henderson, 114 Ala. 601. See § 213 et seq. ante.

[48] 147 Ala. 494.

[49] Story Eq. Pl. § 531.

nature, involving similar principles and results; and may therefor without inconvenience be heard and adjudged together. If that proposition were to be established, and carried to its full extent, it would go to prevent the uniting of several instruments in one bill, although the same parties were liable in respect of each, and the same parties were interested in the property which was the subject of each. So that if, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, although instruments and parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments."

Nor is it true that every equitable claim between the same parties must be enforced by a separate bill in Alabama. Thus one bill may be filed to redeem lands covered by different mortgages to the same defendant, and to have cancelled a sheriff's deed to the lands under execution sale upon a judgment debt, which had been made part of the mortgage debt, and also to have cancelled a deed which had passed the title without consideration from the mortgagee defendant to his sister. "The court having jurisdiction for one purpose, will settle all questions necessary to granting the relief prayed upon proper proof.[50]"

§ 257. Limitations of first kind of multifariousness (continued.—So it has been held that a bill to cancel a bond and mortgage to a building and loan association and at the same time to cancel the stock subscription to the association, is not multifarious, because both the stock subscription and the execution of bond and mortgage are parts of the process of borrowing money from such associations.[51]

And it is not multifariousness to present a case upon which part of the relief sought may be granted if the plaintiff is not entitled to all he asks. Thus a bill may seek to exclude the defendant from passing by boat over the plaintiff's oyster beds because the plaintiff owns the land, and then by amendment seek to limit the defendant's passage to a particularly defined

[50] Lyon v. Dees, 101 Ala. 700.

[51] So. Building & Loan Assn. v. Casa Grande Stable Co., 119 Ala. 175.

route, if the plaintiff is not entitled to exclude him entirely.[52] The single purpose of the bill was to protect the oyster beds.

§ 258. Limitations of second kind of multifariousness.— With reference to the second kind of multifariousness, that of joining defendants who have no interest in some of the claims presented by the bill, it is held that this does not prevent the joining of defendants who have different interests in the subject matter if the relief granted will affect them all. Thus in Kennedy's Heirs and Executors v. Kennedy's Heirs[53] a bill was filed by the heirs of William Kennedy against the heirs and executors of Joshua Kennedy to set aside a deed made by William in his lifetime to Joshua in his lifetime on the ground that it had been intended as a trust for the plaintiffs, the children of William, and that Joshua had disregarded the trust, collected the rents, and applied them to his own use. Joshua Kennedy had also been executor of William Kennedy. And the Supreme Court held that it was not multifariousness to seek also from the executors of Joshua an accounting of the rents from the property collected by Joshua in his lifetime, as well as the settlement of Joshua's accounts as executor of William.

Again it is held "that a bill is not multifarious which unites several matters distinct in themselves, but which together make up the complainant's equity and are necessary to complete relief;" and therefore that the creditors of a deceased insolvent debtor may maintain a bill against two life insurance companies at once to restrain their paying over the insurance to the widow as paid for by her, on the ground that the insolvent had paid for it out of his own funds, and that it should therefore be applied to the plaintiffs' claims.[54]

So it is held that a judgment creditor claiming a lien upon certain corporate stock standing in the name of his debtor can by one bill seek to establish the ownership of the debtor in the stock against the conflicting claims of others, and to compel recognition on the part of the corporation of the true owner-

[52] Simonson v. Cain, 138 Ala. 221.

[53] 2 Ala. 572.

[54] Stone v. Knickerbocker Life Ins. Co., 52 Ala. 589.

ship of the shares in dispute. The court said, "The object of this bill is only the enforcement of complainant's asserted rights of ownership in the stock in question. It does not in any aspect seek relief upon the theory that the stock is [the debtor's] property, or that it is now liable for his debts.[55]

§ 259. Limitations of second kind of multifariousness (continued).—So a bill by a ward against the guardian and several sets of sureties on his bond is held not to be multifarious, the guardian's obligation being the single obligation to make true account.[56] And one bill was allowed against a tax collector and several sets of sureties on his several successive bonds, the court holding that "where the direct, proper, and single object of a bill in equity is to obtain payment of money due to the complainant from persons and property that were thus made liable to pay it, but such object cannot be attained without overturning and impairing titles claimed by others in such property, a bill which makes all of them parties to the suit, is not thereby made obnoxious to the charge of multifariousness, however numerous such defendants may be.[57]"

§ 260. Object of bill must be single.—And upon the same principle one bill may be filed by a creditor to set aside many separate conveyances to different parties, even though made at different times, if the common fraudulent design was to avoid the payment of the grantor's debts. "Unity of fraudulent design, when apparent, imparts to the suit singleness of object and purposes."[58]

It is even held that one bill may be maintained by a stockholder not even a creditor of a corporation against many fraudulent grantees of the corporation who had conspired with each other to dissipate the corporate assets, and that various conveyances from the corporation to the defendants may be

[55] Howard v. Corey, 126 Ala. 283.

[56] Matthews v. Mauldin, 142 Ala. 434.

[57] Dallas County v. Timberlake, 54 Ala. 403.

[58] Wimberly v. Montgomery &c. Co., 132 Ala. 107; Henderson v. Farley Nat. Bank, 123 Ala. 547; Williams v. Spragins, 102 Ala. 424. And the digests are full of many other cases upon the point too easily found to require citing.

set aside in the one suit and the grantees held to an account for any loss to the corporation resulting therefrom.[59]

The principle of all these cases is that the object of the bill must be single, and being so, it is immaterial if more than one separate interest is involved in the defenses.

§ 261. Limitations of third kind of multifariousness.—Examples qualifying the application of the third kind of multifariousness, the misjoinder of several plaintiffs with distinct claims, have been rare in Alabama decisions. The joinder of several judgment creditors, or of judgment creditors and simple contract creditors has already been fully discussed in a prior chapter.[60] But the principle just stated as applicable to bills supposed to reveal multifariousness of the second kind, is equally applicable to bills supposed to be affected by multifariousness of the third kind: if the object of the bill is single it is not multifarious. But singleness of purpose must be clear. Not infrequently several property owners join in one bill to enjoin what they allege to be a nuisance to them all, believing that their bill has singleness of purpose. This may be doubted, however, for Daniell cites an English case which held that each plaintiff had a distinct right;[61] so far as each plaintiff was concerned he had a separate nuisance to complain of.

§ 262. Mode of objecting for multifariousness.—Finally, as to the mode of taking objection for multifariousness. Since the Code of 1886, it has been expressly provided by statute in Alabama that "unless taken by demurrer, objection to a bill because of multifariousness must not be entertained."[62] So any early cases holding that multifariousness may be objected to by the court of its own motion[63] are no longer law. If upon demurrer a bill is held to contain more than one cause of action, the proper practice is to allow the plaintiff to elect which cause he will pursue by the bill;[64] for one of the causes may

[59] Northwestern Land Assn. v. Grady, 137 Ala. 219.

[60] See § 119, supra.

[61] 1 Daniell Ch Pr. 350, citing Hudson v. Maddison, 12 Simons, 416. Compare Story Eq. Pl. § 286b.

[62] Code of 1907, § 3095.

[63] Bean v. Bean, 37 Ala. 17; Felder v. Davis, 17 Ala. 425.

[64] Junkins v. Lovelace, 72 Ala. 303; Marriott v. Givens, 8 Ala. 694.

be struck out by amendment.[65] Where however, an interposed demurrer was not acted upon by the chancellor, but the parties proceeded to a hearing and a final decree upon one matter only, on appeal the Supreme Court refused to dismiss the bill for multifariousness, presuming that the objectionable portion was abandoned by the plaintiff without requiring action by the court below.[66]

Let us now proceed to the framing of the bill.

[65] Long v. Mechem, 142 Ala. 405; Taylor v. Dwyer, 131 Ala. 90.

[66] Betts v. Betts, 18 Ala. 787.

CHAPTER IX.

Of the Frame of the Bill.

§ 263. Alabama statute declaratory only.—It is required in Alabama that a suit in chancery be commenced by a bill;[1] but the requirements as to the frame of the bill are few. It is provided that, "The bill must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition, and conclude with a prayer for the appropriate relief, without averring any combination or confederacy between the defendants or others, the insufficiency of the remedy at law, or charging pretenses by the defendants; and it is the duty of the courts to discountenance prolix statements and unnecessary and false allegations in all chancery pleadings."[2] But this law probably intended merely as declaratory of the English chancery practice at the time; for Brickell, C. J., observed that a bill conforming to this statute would have been good before its enactment;[3] and those parts of an English bill known as the confederating part, the charging part, and the averment of jurisdiction of chancery were not deemed indispensable in England.[4]

§ 264. Formalities to be avoided when useless.—Nor must it be assumed that an insertion of parts of the bill not mentioned in the above statute is thereby entirely forbidden. The Alabama rules of chancery practice recognize and provide forms for a "stating part" and an "interrogating part"[5] neither of which is referred to in the above statute; and the Supreme Court of Alabama has recognized the use of a charging part,[6] which is the part in which alleged pretenses of the defendant are sometimes set forth. So if a plaintiff has ground to complain of a conspiracy or confederation among the defendants,

[1] Code of 1907, § 3090.
[2] Code of 1907, § 3094; Code of 1896, § 677.
[3] Seals v. Robinson, 75 Ala. 363.
[4] 1 Daniell Ch. Pr. 426, 428, 430.
[5] Chancery Rules 8, 9, 13, Code of 1907.
[6] Per Tyson, J., in McDonnell v. Finch, 131 Ala. 85, 89.

and desires to use it as a premise for connecting other persons or other events with his cause, of whose identity he is uncertain at the time of filing his bill, there can be no doubt that the insertion of such a part would be unobjectionable. The meaning of the statute is clear, however, that no unnecessary formalities should be used, and no useless elaboration of averments be indulged in; and if such practice were indulged in notwithstanding the above provision of the Code, although it might not invalidate the bill, the defendant could doubtless except to it for impertinence or prolixity, and have the useless matter expunged at the plaintiff's cost.

§ 265. English bill to be followed when useful.—There are times, however, when each of the several parts used in the English bill, except perhaps the part averring jurisdiction of the court of chancery, can be made of distinct use to the plaintiff today; and for that reason, as well as for the purpose of gaining a systematic knowledge of chancery procedure, the parts of the English bill will be briefly identified and their uses pointed out. Moreover the Alabama decisions important for the pleader to know, can only be cited intelligently under the parts of the English bill from which the bill usually drawn in Alabama has been evolved.

§ 266. Parts of an English bill.—An English bill in chancery was commonly said to consist of nine parts, identified as I. The Address, II. The Introduction, or the names and addresses of the plaintiffs, III. The Starting Part, IV. The Confederating Part, V. The Charging Part, VI. The Averment of Jurisdiction of Chancery, VII. The Interrogating Part, VIII. The Prayer for Relief, and IX. The Prayer for Process. To which may be added under the practice after 1845, X. The Footnote, a part, as we shall see, absolutely necessary in Alabama.[7]

The separation of the bill into these sections is not entirely a formality. It is often overlooked by Alabama practitioners that many necessary averments of a bill have nothing to do with the cause of action proper; and yet if they are stated in one unbroken bill the defendant finds himself required to an-

[7] 1 Daniell Ch. Pr. 406.

swer what the plaintiff's name, age, and residence are, what the names and residences of other defendants are; and sometimes he is required to answer the prayer itself. All of this is of course improper, and should be avoided by drafting the bill with more precision.

Forms for each of these parts of the English bill, made applicable to Alabama practice, will be found in Appendix A. Let the parts now be examined in turn in the light of Alabama decisions, with a view to determining the occasion for their use.

§ 267. Part I. The address: necessary in Alabama.—The first part was called "The Address of the Bill," and was the formal beginning of the bill, in which the plaintiff addressed the King's most excellent Majesty in his High Court of Chancery.[8] It required at most but a few lines, but was distinct in itself; and so was called a "part." It is absolutely necessary in Alabama pleading; for the Code provides that a bill must be addressed to the Chancellor of the Chancery Division in which the bill is filed.[9]

The statute must not be understood as requiring that the bill must be addressed to the chancellor of the chancery court, however, if it is to be filed in some other of the courts created by the legislature with equity jurisdiction concurrent with the Chancery Court.[10] In case the bill is to be filed in a "City Court" or a "Law and Equity Court," or in one of the particular circuit courts upon which equity jurisdiction has been conferred,[11] it should be addressed to the judge or judges of that court by name, with his official title.

§ 268. Part II. The introduction: Necessary in Alabama.—The second part was called "The Introduction," or the names and addresses of the plaintiffs. This part of the bill also was very brief, and consisted of an exact statement of the names of the plaintiffs and their residences. It is necessary in all bills everywhere to inform the defendant exactly who is com-

[8] 1 Daniell Ch. Pr. 408.

[9] Code of 1907, § 3090.

[10] For a list of the courts in Alabama having equity jurisdiction in the several counties, and the terms for which they sit, see Appendix B.

[11] See Chapter II, ante.

plaining against him, and in Alabama it is probably necessary also to let him know whether or not the plaintiff is a resident of Alabama, for if the plaintiff is a non-resident, the defendant may require security for the costs of suit before proceeding to defend.[12]

Other reasons given by Daniell, and quoted with approval by the Supreme Court of Alabama,[13] are "that the court and the defendants may know where to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit." It is apparent, however, that these reasons apply only to the cases of resident plaintiffs; so if the bill alleges that the plaintiff is a non-resident, it would seem immaterial, except to prosecute him for perjury, whether his place of residence out of Alabama is given or not.

It is not necessary to give the age of the plaintiff, for the defendant is at liberty to set up the plaintiff's infancy by plea, if it does not appear upon the face of the bill; but the Supreme Court has indicated that it is the better practice to give the plaintiff's age, that is, whether he is an infant or not, along with his name and residence.[14] It is held that a bill filed by a woman, need not allege whether she is married or single, however.[15]

§ 269. The Introduction (continued).—If the plaintiff is sueing in a fiduciary capacity or by reason of a particular interest as bondholders or stockholders of a corporation, it is not uncommon practice to so state in the introduction, for the purpose of identifying the plaintiff clearly in the mind of the court, or of the defendant when the subject matter brought forward by the bill is large. But it is probably unnecessary to do so; for the Supreme Court said, "Description is not in pleading equivalent to averment. And it was not necessary, in setting forth in the beginning of the bill who the plaintiffs were, to explain in the same breath their connection with or

[12] Code of 1907, § 3687; see § 52, supra.

[13] Liddell v. Carson, 122 Ala. 518, 528, citing 1 Daniell Ch. Pr.

[14] Liddell v. Carson, 122 Ala. 518.

[15] Paige v. Broadfoot, 100 Ala. 610.

relation to the matters in respect of which the suit was brought."[16] Certain it is that the insertion of such matter in the introduction does not avoid the necessity of making additional allegation of it in the statement of the cause.[17]

Where the plaintiff sues as one of many similarly interested, in behalf of himself and others who may choose to come in later and join him, this part of the bill is the proper one in which to so allege and make his invitation.[18]

§ 270. Names and addresses of defendants: Necessary in federal courts.—In addition to the names and residences of the plaintiffs it is good practice to set forth in the introduction the names and residences of the defendants. This is required in the United States Courts;[19] and although the reason for doing so, based upon the jurisdictional requirement in the Federal courts of diversity of citizenship between the plaintiffs and defendants, does not obtain in the state courts, the convenience to the court to see at once who the defendants are, is ground enough for the practice.[20] Moreover if any of the defendants is a non-resident it is appropriate to so state somewhere in the bill as a basis for a prayer or an application for an order of publication; and no place is so suitable as the introduction for such an allegation, which does not usually require answer by other defendants.

§ 271. Part III. The Stating Part: Necessary in Alabama.—The third part of the English bill was called "The Stating Part," or sometimes, the premises. This was the part in which the plaintiff stated his cause of action;[21] and it is this part which in Alabama bills has been allowed to absorb almost all the others. Its use should be limited, however, to a clear systematic statement of the case, setting forth the plaintiff's title, or other right involved, and a succinct history

[16] Per Manning, J., in Savannah & Memphis R. R. v. Lancaster, 62 Ala. 555; 1 Daniell Ch. Pr. 408.

[17] Savannah &c. R. R. v. Lancaster, 62 Ala. 555.

[18] 1 Daniell Ch. Pr. 410. See Steiner v. Parker, 108 Ala. 357; Steiner v. Parsons, 103 Ala. 215; Savannah &c. R. R. v. Lancaster, 62 Ala. 555.

[19] Equity Rules of U. S. Courts, No. 20.

[20] McDonald v. McMahon, 66 Ala. 115.

[21] Code of 1907, § 3104.

of the title or right derived from some ancestor or other person through whom the plaintiff claims.[22] It is unwise to make the statement so brief as to require explanation in order to make a witness' testimony in support of the right claimed relevant evidence. And on the other hand it is unwise to state collateral details the failure to prove which might give the court cause to hold the plaintiff guilty of a variance.

§ 272. Stating Part the substance of the bill.—In Strange v. Watson[23] Chief Justice Collier said, "The premises or stating part of the bill contains a narrative of the facts and circumstances of the plaintiff's case, and of the wrong or grievance of which he complains, and constitutes in truth the real substance of the bill upon which the court is called to act. Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, otherwise he will not be permitted to offer or require evidence of such fact. A general charge or statement of the matter of fact, is however sufficient; and it is not necessary to charge minutely all the circumstances which tend to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs."

No better statement has since been made or could be made of the proper contents of this part of the bill; and whatever the matter involved the pleader will not go astray by conforming it to those requirements. How to state particular causes of action, and the details of the statement have already been treated under the head of the matter of the bill.[24] And all the important decisions have been cited under the various topics discussed in that chapter on that subject. So it is unnecessary to dwell longer upon how to state the cause.

§ 273. Distinguished from Charging Part.—It is important, however, to distinguish the office of the stating part from that of a later part known as the charging part, which our pleaders generally omit. The distinction is this: the stating part should contain every thing necessary to make out the equity

[22] 1 Daniell Ch. Pr. 411.
[23] 11 Ala. 324, 336.
[24] See Chapter VII, supra.

of the bill, whereas the charging part is directed against anticipated defenses. When we read decisions that the averments of the bill must contain all the plaintiff's equity,[25] we must understand them as applicable to the stating part, and it is primarily the stating part which is attacked by a general demurrer for want of equity; for from its very nature the plaintiff's whole cause is there presented.

§ 274. Should be limited to statement of case.—Care should be taken therefore that the stating part should be limited to the statement of the plaintiff's case, and nothing should be alleged therein which might injure it. Of course this does not mean that the plaintiff should be deluded into stating a case in chancery when there are other easily ascertained facts which the defendant can bring forward to destroy it; but that facts of doubtful value except for defense should be avoided in this part of the bill; since the court might construe them as limiting the equity involved in the facts upon which the plaintiff relies, when they would be more justly brought to bear upon the defendant's defense. Thus in Overton v. Moseley[26] the plaintiff set forth in his bill that one C was formerly the owner in possession of Blackacre, and as such was grantee in a deed from S of the right to keep a drain over Whiteacre of which S was possessed and which had since become vested in the defendant by deed referring to the drainage right; and that the plaintiff was now owner of "the land," having derived title thereto from C. The suit was to enjoin the interference with the drainage.

If the plaintiff had alleged no more, he would probably have gotten his injunction; for the court held on demurrer that the right of drainage was an easement, and by the deed to C was made appurtenant to Blackacre, and so would naturally have followed the title of the land to the plaintiff, unless facts were set forth in denial.

But these facts the plaintiff very unfortunately suggested himself; for anticipating a claim that he had abandoned the easement, he alleged that he had been in adverse possession

[25] Cockrell v. Gurley, 26 Ala. 405; Sayre v. Elyton Land Co., 73 Ala. 85; McDonnell v. Finch, 131 Ala. 85; Overton v. Mosely, 135 Ala. 599.

[26] 135 Ala. 599.

of "the land" claiming it as his own, and had frequently cleaned out the ditch. So the court held that he had not sufficiently alleged adverse possession of the easement itself, apart from his title from C, and not averring his line of title from C to the easement as well as the land, may well have gotten the land without the easement. Evidently the court's narrow construction of the claim of title was caused by the suggestion of defective adverse possession.

The averments of adverse use should have been severed from the statement of the cause and inserted in a separate charging part in rebuttal of an anticipated claim of abandonment.

§ 275. Stating Part to be divided into sections and to have no blank spaces.—Chancery Rule 8, Code of 1907, requires that the stating part of all bills must be divided into sections and numbered consecutively 1, 2, and so forth; which enables the defendant to answer intelligently, and to prevent the fraudulent insertion of new matter without a formal amendment.

And Chancery Rule 10, Code of 1907, provides that "Bills which contain blanks shall be considered defective, and may be ordered to be taken off the file." Of course this refers to blank spaces, not omissions of substantial allegations without which the bill would be subject to demurrer.[27]

§ 276. Part IV. The Confederating Part.—The fourth part was called "The Confederating Part." This part of the English bill is supposed to have originated in the idea that additional parties who might be found later than the time of filing of the bill to have been conspiring with the named defendants to deprive the plaintiff of his rights, could not be joined without reference to them in the bill. Within the history of modern equity pleading, however, such has not been the case; and so the confederating part was mere surplusage even in the English bill, and could be omitted.[28] The burden of it, as may be seen from the form in Appendix A, was to allege that the defendants had been conspiring with various

[27] McKenzie v. Baldridge, 49 Ala. 564.

[28] 1 Daniell Ch. Pr. 426. The Confederating part is prohibited in Alabama by § 3094, Code of 1907. See § 263, supra.

other persons now unknown to the plaintiff, whom when found out the plaintiff desired to make additional parties defendant to the bill.

§ 277. Forbidden in Alabama as a form, but useful in injunction suits.—The Alabama Code, as we have seen, prohibits the insertion of a confederating part as a mere formality; but if a confederation is really alleged as a fact, there would seem no reason why it should not be inserted as a separate part, so long as the defendants have a chance to deny it. Such a situation may well occur. Suppose, for instance, the plaintiff believes that a conspiracy existed between the known defendants and others to deprive the plaintiff of his rights or to interfere with his affairs, and it becomes necessary to file the suit before all the guilty parties are found out. The Supreme Court has held that all the defendants must be named in the bill, although the decision did not specify the part.[29] And while a person is a party upon whom process is prayed, even though there be no allegations in the body of the bill connecting him with the cause,[30] yet it is clear that such a party might get immediately dismissed by the court upon demurring for being improperly joined.[31] Therefore if the plaintiff inserts a confederating part and later finds others whom he wishes to charge as parties to the fraud, or to enjoin along with the defendants first named from interfering with his rights, there is nothing to do but add them as defendants to the bill and prayer for process and have the order or injunction extended to them in the proper manner; for the bill has abundant allegation of their connection with the cause.

In cases of fraud the advantage to the plaintiff of joining additional parties who had been guilty of nothing but conspiring, would probably be limited to charging the new parties with costs, unless the aim is to set aside different conveyances as fraudulent when their dates are quite far apart,[32] or when

[29] McDonald v. McMahon, 66 Ala. 115.

[30] Bondurant v. Sibley's Heirs, 37 Ala. 565.

[31] See § 181, supra.

[32] Northwestern Land Assn. v. Grady, 137 Ala. 219. Compare, however, Hill Bros. v. Moone, 104 Ala. 353, with Handley v. Heflin, 84 Ala. 600, Hinds v. Hinds, 80 Ala. 225, and Russell v. Garrett, 75 Ala. 348.

notice is an element of importance; and in that event the data of the additional conveyances would require to be set out. But in suits for injunction no premise would seem to be necessary but the averment of a conspiracy to enjoin additional parties.

Of course, this use of the confederating part makes it an essential fact; whereas unless so employed its presence is mere surplusage, as we have seen, incapable of being objected to except perhaps by exception on account of the small costs occasioned in transcribing it. But in this it does not differ from any other allegation in the bill which may turn out to be immaterial, and as such does not vitiate the equity contained in other averments.[33]

§ 278. Part V. The Charging Part: Useful in Alabama.— The fifth part of the English bill was called "The Charging Part." It was not uncommonly availed of to charge various pretenses on the part of the defendants which the plaintiff was prepared to rebut. And no doubt the charges were often false and absurd, and the defendants had no idea of setting them up; so that they merely padded the bill, and led to a disapproval of the use of the part.[34] Indeed the Alabama Code expressly prohibits the charging of pretenses by the defendants.[35] But this must not be understood as prohibiting the use of the charging part to anticipate and rebut honest defenses which the plaintiff knows that the defendant will set up; and the use of a charging part has been recognized by the Supreme Court of Alabama.[36] So where a charging part is appropriate, the plaintiff is at liberty to avail himself of it.

Of course the plaintiff should not use the charging part merely to negative matters which he thinks the defendant will set up.[37] But in many cases "its introduction is highly beneficial, not only for the purpose of introducing matters

[33] See § 206, supra.

[34] See observations of Lord Eldon and Lord Kenyon cited by Daniell in 1 Chancery Pr. 428; Equity Rules of U. S. Courts, No. 21.

[35] Code of 1907, § 3094.

[36] McDonnell v. Finch, 131 Ala. 85, 89, refers to it without comment.

[37] See § 202, supra.

which would formerly have been the subject of a special replication, but as a foundation for interrogatories which may lead to a discovery of the defendants case, and likewise afford grounds for collateral inquiries * * *" [38]

It should be used to bring forward additional facts which will prevent apparent defenses from being good. Thus it is the proper part in which to charge circumstances going to disprove that a defendant is a purchaser for value without notice, if the plaintiff foresee that the defendant will set up such a defense.[39] And it would have been proper for the plaintiff in Overton v. Moseley,[40] to allege in a charging part of his bill that the defendant could not be heard to say that the plaintiff had abandoned the easement in question, because the plaintiff had used the ditch constantly and cleaned it out frequently in recent years. Had he so pleaded, the demurrer might have been overruled.

§ 279. Charging Part valuable to prevent pleas.—Another valuable use to be made of the charging part of the bill, is to prevent the defendant from filing a plea to the bill. For by rebutting the pleas which it would appear that the defendant is likely to file, by setting up in different charges other facts rendering them worthless, the defendant is forced to answer the bill and to go to trial upon the facts at once. And the charging part not being limited to one counter defense, a careful pleader for the plaintiff can by the use of this part present all the surrounding circumstances which may help his cause if they would have any relevancy to any reasonably probable defense, even though they might be im-

[38] 1 Daniell Ch. Pr. 429.

[39] The burden is upon a purchaser of a legal title charged with an equity to allege that he bought it for value without notice. McKee v. West, 141 Ala. 531, citing a series of cases beginning with the leading case of Craft v. Russell, 67 Ala. 9. Coskrey v. Smith, 126 Ala. 120, an ejectment suit in which a plaintiff was allowed to recover on proving purchase for value, because the holder under foreclosure deed of a vendors lien failed to prove notice, shows a seeming conflict between the rules in Alabama for pleading notice at law and in equity. But see Bank of Luverne v. B'ham Fertilizer Co., 143 Ala. 153, holding a bill without equity for not charging notice. And compare § 468, post.

[40] 135 Ala. 599. See § 274, supra.

pertinent to the equity of the stating part of the bill as it has been presented.

§ 280. Part VI. The Averment of Jurisdiction.—The sixth part of the English bill was called "The Averment of Jurisdiction." This part consisted merely of the conclusion that the defendant's actions as set forth in the former parts were against good conscience, and pointed out that the plaintiff was without a complete remedy at law in the premises. It was a formal averment that the bill was properly brought. Of course a mere averment that equity had jurisdiction of the cause cannot confer jurisdiction of the bill; so this part of the bill could be omitted without leaving the bill defective.[41]

The Alabama Code[42] forbids making such an averment; so if it is inserted the defendant probably could have it expunged at the plaintiff's cost. But it can be made very short, and if the plaintiff desires to plead according to the books, he will probably be allowed to insert the nominal sixth part offered in the Appendix without objection by the defendants.

§ 281. Part VII. The Interrogating Part: Useful in Alabama.—The seventh part of the English bill was called "The Interrogating Part." This part was used to bring out clearly and require exact answers from the defendant upon the important points made by the stating and charging parts of the bill; and if there were more defendants than one, to separate the important points upon which careful answers were required from the respective defendants. Consequently it could contain no questions which were not based upon allegations in the former parts of the bill.[43] Its usefulness in Alabama practice is not different. In a complicated case, a clever defendant can often make evasive response to the matters of the bill so as to give the plaintiff little satisfaction; but if the important matters are reiterated in carefully framed interrogatories, it is difficult for the defendant to avoid them.

§ 282. Different from bill of discovery: Oath to answers may be waived.—The purpose of the interrogating part must not be confused with that of a bill for discovery however.

[41] 1 Daniell Ch. Pr. 444.
[42] Code of 1907, § 3094.
[43] 1 Daniell Ch. Pr. 430.

"The only discovery sought is purely incidental." The interrogating part of a bill "consists of a series of questions intended to obtain discovery in aid of the complainant's case, and required to be directed to facts previously stated or charged. These interrogatories are chiefly designed to prevent misapprehension or evasion by inquiring not only as to the facts specifically alleged, but as to circumstances of possible variation."[44] It is possible therefore to insert an interrogating part in bills when the oath to the answer is waived,[45] although ordinarily it would be useless to do so, since the plaintiff cannot except to the sufficiency of answers when he has waived the oath;[46] and unless the plaintiff can compel the defendants to give discovery which would help his bill, they are not likely to do so.

When the plaintiff has waived in the bill the oath to the answer, he cannot later file, by way of amendment after answer, an interrogating part to which he requires the defendants answer under oath.[47]

§ 283. Alabama Chancery Rules applicable to this part.— Chancery Rule 9 in the Code of 1907, requires that the several interrogatories in this part of the bill shall be separated, and numbered consecutively 1, 2, 3, &c., and Chancery Rule 13 prescribes a form for this part of the bill, which is given in the appendix. But these rules do not require the bill to have such a part, and the form is held to be merely directory, for the interrogating part can be omitted at the pleasure of the plaintiff.[48] The insertion of an interrogating part does not dispense with a footnote to the bill, however, as we shall see,[49] but the footnote should be used to point out the interrogatories to be answered by the several defendants, where there are many, and so does not make the bill as tautological as it would seem.

[44] Per Somerville, J., in Russell v. Garrett, 75 Ala. 348.

[45] Russell v. Garrett, 75 Ala. 348; Montgomery Iron Wks. v. Capital City Ins. Co., 137 Ala. 134; Burke v. Josiah Morris & Co., 121 Ala. 126.

[46] Chancery Rule 34, Code of 1907.

[47] McCaw v. Barker, 115 Ala. 543.

[48] Thornton v. Sheffield & Birmingham R. R., 84 Ala. 109.

[49] Chancery Rule 12, Code of 1907.

§ 284. Part VIII. The prayer for specific and for general relief.—The eighth part of the English bill was "The Prayer for Relief." After having presented the whole case to the chancellor, it was necessary for the plaintiff to ask the court to grant the relief which he desired. In the early practice it is probable that the plaintiff did not ask any specific relief, but merely asked such relief as the court thought proper to give him upon the facts set forth in the bill.[50] This latter is called the prayer for general relief, and has never been abandoned; but in the later English practice from which we derived ours, it was the custom to add to the prayer for general relief another prayer for some specific relief to obtain which the averments of the bill were directed. It is hard to tell whether the custom of adding this special prayer was good for the plaintiff or not; for the result of it was that if the court held that the facts did not warrant the granting of the specific relief prayed, the plaintiff could obtain no relief at all, or at best such relief under the prayer for general relief as might be consistent with the relief sought under the special prayer; and this does not seem to have amounted to much.[51] Sometimes if additional facts were introduced into the bill with a view to obtaining different relief under the general prayer, it seems to have been obtained;[52] and sometimes at the hearing, when the special prayer was wrong, the court would hold over the case for the plaintiff to amend his bill, provided it was clear that he was entitled to some relief, and the amendment would not make a new cause of action.[53]

§ 285. Court may set aside submission to allow amendment of prayer.—In Alabama, as we shall see, the plaintiff can amend at the hearing upon terms, as of right; and the right to amend includes the right to amend his prayer;[54] but the English cases would probably be ground for an Alabama

[50] 1 Daniell Ch. Pr. 434.

[51] 1 Daniell Ch. Pr. 435, et seq., and English cases reviewed.

[52] 1 Daniell Ch. Pr. 438.

[53] 1 Daniell Ch. Pr. 439; Beaumont v. Boulton, 5 Vesey 485; Paulk v. Lord Clinton, 12 Vesey 63.

[54] McDonnell v. Finch, 131 Ala. 85; Sharpe v. Miller, 47 So. Rep. 701.

chancellor to act under the new section 3212 of the Code of 1907, and set aside a submission of his own motion to allow the amendment if he finds that he cannot grant the relief that justice requires under the prayer found in the bill.

§ 286. Prayer for specific relief a guide to defense.—It is true that some advantage accrues to the plaintiff in complicated cases from the opportunity to outline to the court in a special prayer the complete relief which he has presented his facts to obtain; for unless so systematically sought, it is unlikely that the court would trace out his rights so completely. But the probable reason for adopting the prayer for specific relief was to protect the defendant from surprise. Out of a long statement of involved facts without a prayer for specific relief it would often be impossible for the defendant to pick out the basis of the plaintiff's attack; and so after answering he would be forced to frame his defenses in the air.[55]

§ 287. Alabama rule as to prayers.—In Alabama the only statutory requirement as to prayers is in section 3094 of the Code of 1907, that the bill "must conclude with a prayer for the appropriate relief." This law appeared first in the Code of 1852, and it is not clear whether it imposes the necessity for a prayer for specific relief or not. An early case prior to the statute, contains a dictum that a prayer for general relief is sufficient; but the bill under review had no prayer for general relief, and the decision was that the specific relief which it asked could not be granted, and that in the absence of a prayer for general relief the court could give the plaintiff no relief at all.[56] As to the latter point, there can of course be no question; but the dictum that a prayer for general relief alone is sufficient is contradicted by a statement as to prayers made by Justice Clopton in Lyons v. McCurdy,[57] "Formerly," he says, "when bills in chancery contained only the prayer for general relief, any relief warranted by the facts stated in the bill and proved, would be granted; and since it has become the uniform practice to insert a special statement of relief, if the complainant mistakes in his special prayer the

[55] Langdell Eq. Pl. § 61.
[56] Driver v. Fortner, 5 P. 9, 26.
[57] 90 Ala. 497.

proper relief, it may be granted under the general prayer, if not repugnant to the special relief prayed, and consistent with the case made by the bill."

This statement was in accord with the generally accepted practice and the decisions, both as to the practice of inserting a prayer for specific relief, and as to the nature of the relief different from the specific relief asked which can be granted under the general prayer. In the later case of Pattison v. Bragg[58] it was held that relief entirely different from the specific relief sought could not be granted under the prayer for general relief. And this was not contrary to the weight of Alabama decisions.[59] It was possible on failure to sustain the grounds to the full relief asked, to obtain a part of it under the general prayer;[60] but even then 'the proven part must fall within the general purview of the averments, and not be repugnant to the prayer.'[61]

§ 288. Applications of rule.—It is true that the Alabama decisions have not been so strict in determining the consistency between the specific relief sought and that grantable under the general prayer as the English decisions had been; and there has been a tendency to follow a general theory that any relief is grantable under the general prayer which is in accord with the case made by the bill. Thus it was twice held that a bill filed by a vendor to enforce specific performance of a purchase of land, though defective to that end, might sustain, by reason of the prayer for general relief, a decree for the foreclosure of the vendor's lien shown by the averments.[62] And in Gonzales v. Hukil,[63] a similar bill was similarly enforced, although the averments showed that the sale was void, the court holding, although it would seem unwarrantably, that the lower court was enabled to grant this relief

[58] 95 Ala. 55.

[59] Florence Sewing Machine Co. v. Zeigler, 58 Ala. 221; Shelby v. Tardy, 84 Ala. 327.

[60] Parmer v. Parmer, 88 Ala. 545; Florence Sewing Machine Co. v. Zeigler, 58 Ala. 221.

[61] Per Stone, C. J., in Shelby v. Tardy, 84 Ala. 327.

[62] May v. Lewis, 22 Ala. 646; Munford v. Pearce, 70 Ala. 452.

[63] 49 Ala. 260. And see Mobile Land Improvement Co. v. Gass, 142 Ala. 520, where a decree holding a conveyance voidable was rendered under a general prayer when the special prayer sought to have it decreed void ab initio.

"without surprise to the defendant." But if it be admitted that the matter of these decisions tends to stretch the sufficiency of the general prayer for the case made by the bill, no fault need be found with the theory; for if the bill is properly drawn for the special prayer, probably no relief which might be directed by the court would be really inconsistent with the specific relief sought by the plaintiff. As said by Collier, C. J., in an early case, "It is an unquestioned rule, that if the complainant mistakes the relief to which he is entitled in his special prayer, the court may afford the redress to which he is entitled under the prayer for general relief; provided the relief is such as is agreeable to the case made by the bill. * * * For the court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose, to answer another; especially if the defendant may be surprised or prejudiced thereby."[64]

§ 289. Consistency a logical necessity.—The rule requiring such general consistency is a logical necessity; for if relief could be given under the general prayer utterly without regard to the special prayer, then the special prayer might be based upon one theory of the case and the plaintiff be given relief upon an entirely inconsistent theory of the case, and the bill be made multifarious without even the warning given the defendant by inconsistent prayers. The invalidity of a bill with inconsistent prayers has been healed by a new section of the Code of 1907, as we have seen;[65] but that statute ought not to be extended, and probably will not be extended, to authorize the theory of the special prayer and the relief granted under the general prayer to be inconsistent; for to be totally unwarned as to the nature of relief sought by the bill would do great injustice to the defendant. It would be more sensible to dispense with the prayer for specific relief altogether. And indeed the practice would in effect be reduced to that; for the inapplicability of the special prayer, from being the excep-

[64] Strange v. Watson, 11 Ala. 324, 336. And compare Sharpe v. Miller, 47 So. Rep. 701.

[65] Sec. 3095, Code of 1907. See § 246, et seq. ante.

tional case, would be made the customary case; and only the most extreme relief would be asked by it; and the practice would be to rely upon the general prayer for whatever sort of relief might turn up at the hearing of the cause.

§ 290. McDonnell v. Finch.—Dangerous as such a condition of the law would be, the language of the court in the recent case of McDonnell v. Finch[66] without careful examination, would seem to support it; and that even without regard to new section in the Code of 1907. The bill in that case was filed by creditors attacking certain alleged fraudulent attachments by other creditors, and prayed specifically that the attachments be declared to operate as a general assignment of all the property of the debtor for the benefit of the plaintiff and all other creditors, with a prayer for general relief. The plaintiff below sought to amend the bill by striking out the special prayer as above, and inserting a prayer merely that the attachments be "declared fraudulent, null, and void" as to the plaintiffs. The case went to the Supreme Court upon the refusal of the Chancellor to allow the amendment and upon a decree dismissing the bill for want of equity. The Supreme Court reversed the decree dismissing the bill for want of equity, and remanded the cause for plaintiffs to amend their bill if they saw fit; and of course nothing else could have been done; because the amendment would have made a thoroughly consistent bill, though with a different construction of the averments. Some of the language of the opinion was unfortunately misleading, however, The Court, Tyson, J., said "It has never been supposed that a special prayer could be made the basis for relief inconsistent with the facts stated in a bill, or could impair its equity. Under it the court could only grant such relief as the case stated would justify. If no case is made, no relief could be granted and if a case is stated which is inconsistent with the special prayer, relief may be granted under the general prayer, but not under the special prayer."[67] The decision was concluded, the court said, by

[66] 131 Ala. 85.

[67] It seems hardly necessary to cite authority that the prayer cannot supply matter which the averments of the bill do not contain. Jacoby v. Funkhouser, 147 Ala. 254.

the prior decision in Steiner v. Parker [68] which was likewise upon a bill filed to attack certain attachments of a debtor's property as fraudulent, and containing the same prayer that the attachment be held to work a general assignment, together with a general prayer. The Court, Coleman, J., in delivering the opinion, said, "There was equity in the bill in so far as it averred fraud in the issuance of the attachment, and under the prayer for general relief the complainants were entitled to relief. The demurrer to the whole bill for want of equity should have been overruled." The plaintiffs were allowed thirty days to amend.

In this view of the situation it is clear that the existence of fraud was taken as the basis of equity only; for that was not inconsistent with the special prayer, which the court held could not be granted. The amendment could of course change the prayer as the plaintiff might elect. The opinion in McDonnell v. Finch, therefore, must not be taken as meaning any more than that the bill had equity, under the general prayer and should not have been dismissed. A construction going further than that would have been revolutionary dictum, and could not have been intended by the Court.[69]

§ 291. Alternative prayers.—That brings us back to the proposition what is the plaintiff to do when he is uncertain which of two or more theories of the case the court will take, the relief to be obtained under the one or the other of which would be too different to be granted under the prayer for general relief. That was the case in Lyons v. McCurdy;[70] and the court, Clopton, J., said, "It is well settled that if the complainant doubts the specific relief to which he is entitled,

[68] 108 Ala. 357.

[69] In Bledsoe v. Price, 132 Ala. 621, Tyson, J., cited McDonnell v. Finch as sustaining the following proposition, "The nature and character of the bill must be determined from a consideration of the facts averred in it. And if upon the facts stated, the bill has equity, the special prayer will not destroy that equity." This is in accord with the meaning of the decision as given above in the text. The decision in Ala. Terminal &c. Co. v. Hall, 44 So. Rep. 592, is not necessarily contradictory to this view.

[70] Lyons v. McCurdy, 90 Ala. 497. And see language of the court in Strange v. Watson, 11 Ala. 324, 336. 1 Daniell Ch. Pr 441.

he may frame his prayer in the alternative, so that if one kind is denied, another may be granted, the only requirement being that each kind shall be consistent with the case made by the bill."

Formerly it was necessary that the theories or conclusions upon the facts of the bill out of which these alternate prayers are drawn, must be consistent; but since the new statute, we have seen that this is no longer necessary, provided the allegations taken alone without the prayers are not contradictory.[71] If the allegations themselves are contradictory, however, the bill will not be entertained because on a decree pro confesso the court could not tell what the facts are confessed to be.[72]

§ 292. Offer to do equity: Necessary in Alabama.—It was customary after the prayers of the bill, for the plaintiff to offer to do whatever the court might think his duty as a person coming into a court of conscience.[73] It is a fundamental principle of equity that he who asks equity must do it, and unless the plaintiff had already done everything which could be required of him, (as to which he might well be mistaken) it was necessary for him to offer to the court in his bill to do his share of equity whenever the court might require.

This offer is likewise necessary in Alabama; for the courts today will no more presume than an English court would presume that the plaintiff will do anything he is not required to do. And the court is 'without power or jurisdiction to render a decree against him requiring him to do equity without such an offer in the bill.'[74] And this rule applies whether the plaintiff be adult or infant;[75] for the principle is clear that an infant has no more right than an adult to seek relief from the acts of others, and hold the benefit of them at the same time.[76]

[71] Code of 1907, § 3095. See Chapter VIII. supra.

[72] See § 238, supra.

[73] 1 Daniell Ch. Pr. 441.

[74] Marx v. Clisby, 130 Ala. 502; Sloss-Sheffield S. & I. Co. v. B. of T. University of Ala. 130 Ala. 403; Garland v. Watson, 74 Ala. 323; Smith v. Conner, 65 Ala. 371; Rogers v. Torbut, 58 Ala. 323; Eslava v. Elmore, 50 Ala. 587.

[75] Marx v. Clisby, 130 Ala. 502.

[76] Hobbs v. N. C. & St. L. Ry., 122 Ala. 602; Robertson v. Bradford, 73 Ala. 116; Goodman v. Winter, 64 Ala. 410.

Of course it is not necessary in every bill to offer to do equity; for there may be nothing which the plaintiff has done wrong, and the defendant alone may have acted unconscionably;[77] but where conflicting interests in property are involved, or matters of debt or account, it is rare that the plaintiff is not liable to some charge for the benefit of the defendant; and then he can get no relief without offering to do his part. Common cases are suits for relief against mortgages for usury;[78] and suits seeking rescision of contracts, where the defendant should be put into his former condition.[79]

And the offer to do equity is equally necessary in cross bills if the defendant should have made the offer had his bill been original.[80]

§ 293. Omission of offer where necessary, destroys equity of bill.—The offer to do equity is not a mere formal requirement of the bill.[81] So while the absence of the offer would naturally be raised by demurrer, in which case the plaintiff would have leave to amend the bill inserting it;[82] the court would err in granting any relief upon such a bill at the final hearing; and the cause would be reversed by the Supreme Court on appeal. In the latter case, however, the practice seems to be to dismiss the bill without prejudice to the plaintiff to sue again.[83]

Upon the whole therefore, it would seem wise for the pleader to insert an offer to do equity in every bill, for the absence of it, due to matters brought forward by the answer, may be fatal to him without amendment; and the insertion of the offer at first will require but little space.

§ 294. Part IX. The Prayer for Process: Necessary in Alabama.—The ninth part was called "The Prayer for Process."

[77] Marx v. Clisby, 126 Ala. 107.

[78] George v. New England Mtge. Sec. Co., 109 Ala. 548; Rogers v. Tarbut, 58 Ala. 523; Eslava v. Elmore, 50 Ala. 587; Branch Bank of Mobile v. Strother, 15 Ala. 51.

[79] Algood v. Bank of Piedmont, 115 Ala. 418.

[80] Am. Freehold Land Mtge. Co. v. Sewell, 92 Ala. 163.

[81] Sloss-Sheffield &c. Co. v. B. of T. of University of Ala., 130 Ala. 403.

[82] Smith v. Conner, 65 Ala. 371.

[83] Marx v. Clisby, 130 Ala. 502.

The English bill always ended in a prayer for process, usually the writ of subpoena, to issue under the King's Seal directed to the defendant, requiring him to appear and answer the bill. And it was a rule that all persons sought to be made defendants must be expressly named in the prayer for process.[84] Nor was this a mere form; for since as we have seen, the defendants do not have to be named as such in the introduction, where the plaintiffs are named, but are merely referred to throughout the statement and charges of the bill, there is nothing to show who are defendants but the prayer for process.

This is law in Alabama also: and no persons are defendants unless process of court is prayed against them by name.[85] Moreover Chancery Rule 17 of the Code of 1907, requires that the prayer for process or publication shall contain the names of all the defendants.

It is the prayer for process which makes the defendant such; for if process is prayed against a person, even though there are no appropriate allegations in the bill connecting him with the matters at issue, he will nevertheless be required to come in and answer.[86] And if the intention is to sue the defendant in several capacities, whatever there may be in the bill proper, it is necessary to pray process against him in each capacity.[87]

While a form for the prayer for process may be found in Appendix A, it is not absolutely necessary that the prayer be so formal. In McKenzie v. Baldridge [88] it was held sufficient to ask for the defendant by name "to be made a party defendant to the bill" and for that purpose that "a subpoena may issue, &c." The court held that the process was suffi-

[84] 1 Daniell Ch. Pr. 444.

[85] Lucas v. The Bank of Darien, 2 Stewart, 280, 324; Walker v. Hallett, 1 Ala. 279, 387; Bondurant v. Sibley's Heirs, 37 Ala. 565; Walker v. The Bank of Mobile, 6 Ala. 452, 459; Carter v. Ingraham, 43 Ala. 78; McDonald v. McMahon, 66 Ala. 115. The dictum in McKenzie v. Balbridge, 49 Ala. 564, that the statute (now 3094 Code of 1907) as to the form of the bill authorizes the omission of the prayer for process cannot be taken as law.

[86] Bondurant v. Sibley's Heirs, 37 Ala. 565.

[87] Bondurant v. Sibley's Heirs, 37 Ala. 565; Walker v. Hallett, 1 Ala. 379, 387 (semble).

[88] 49 Ala. § 64.

ciently prayed for; but so short a cut is not to be recommended, for the dictum of the court that no prayer for process at all is necessary, is undoubtedly wrong.[89]

§ 295. Praying for publication.—It seems to have been necessary in England to pray process upon a defendant, even though he was known to be out of the jurisdiction, and then to perfect service upon him by publication. This is probably the best practice in Alabama also, even in case of non-resident defendants; for the statute authorizing an order of publication upon proof by affidavit, applies as well to residents absent over six months from home and defendants concealing themselves as to non-residents;[90] and these facts are often not found out until after the filing of the bill.

But Chancery Rule 17 in requiring that the names of all defendants shall appear in the "prayer for process or publication," undoubtedly recognizes the right to pray for publication directly where the bill alleges that the defendant is one to whom publication may be sufficient summons.

§ 296. Prayer for injunction, ne exeat, &c.—Immediately before or after the prayer for process to summon the defendant to appear was usually inserted the prayer for the issue of such special writ of injunction or ne exeat regno, as the particular case might require.[91] In Alabama it is provided by Chancery Rule 17, that, "If an injunction, ne exeat, or any special order is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process."

This rule is misleading, however, for it is the practice to pray for an injunction very frequently when the plaintiff merely desires the issue of the writ upon the final hearing of the cause, after his right to a permanent injunction shall have been established. The issue of a temporary injunction will never be granted in Alabama without execution by the plaintiff of the bond provided for by sections 4515, 4516 or 4517 of the Code of 1907; and this is frequently more dangerous or

[89] See cases in footnote (85), supra.

[90] Code of 1907, § 3104; 1 Daniell, Ch. Pr. 447.

[91] 1 Daniell Ch. Pr. 447.

expensive than the plaintiff desires. So he runs the risk of temporary injury until the final hearing. Where the temporary injunction is required it seems to be customary to pray expressly for the issue of the writ.

§ 297. Part X. The Footnote: Necessary in Alabama.—The tenth and last part of the English bill was called "The Footnote." This part was first required by the orders of August 1841, and seems to have been used to specify the several interrogatories which each defendant was required to answer. It was taken as a part of the bill, however.[92]

In Alabama the use of the footnote is not limited to pointing out to the several defendants the interrogatories they are required to answer. Alabama Chancery Rules 8 and 9 having required that both the stating part and the interrogating part of a bill shall be divided into sections and the sections numbered, Chancery Rule 11 provides that "The complainant shall make a note in writing, at the bottom of the bill, as to the particular statements or interrogatories, by number, which he desires each defendant to answer; and the answer need not go beyond such requisition, except for such defendant's own protection." And Chancery Rule 12 provides that the footnote shall be considered and treated as a part of the bill, and that "the addition of any such note to such bill, or any alteration in or addition to such note, after the bill is filed, shall be treated as an amendment to the bill."

§ 298. Effect of omission of footnote.—The omission of a footnote is of course ground for demurrer.[93] But it seems to go further than that; it amounts to the waiver of the requirement of an answer to the bill; so that the plaintiff "can claim no advantage from the failure of the defendants to answer any of its allegations."[94] If the defendants answer anyway, and the proof sustains the bill in its material averments, the omission would seem to be harmless;[95] but nothing but express admissions in the answers, or proof of the bill will heal it.

In O'Neal v. Robinson [96] Peters, J., said, "Its omission cannot be regarded as a mere formal defect, which is waived if

[92] 1 Daniell Ch. Pr. 407.
[93] Winter v. Quarles, 43 Ala. 692.
[94] Sprague v. Tyson, 44 Ala. 338.
[95] Martin v. Hewitt, 44 Ala. 418.
[96] 45 Ala. 526.

not taken advantage of by objection in the court below. * * * This language [quoting the rule] is peremptory, and it must be obeyed, or the cause is not in a condition legally to pass beyond it. Then, a bill which does not contain this 'note in writing at the bottom of the bill,' is not in a condition for a decree pro confesso against a defendant who has failed to answer so as to give such a decree the force of a decree pro confesso legally taken.' Under such circumstances, the failure to answer and decree pro confesso do not aid the proofs. These must be sufficient to sustain the chancellor's decree without any reference to the presumed confessions of the defendant implied from the decree pro confesso." And in that case the Supreme Court reversed the decree of the chancellor below just as it would for any other error in a final decree.

§ 299. Omission may be cured by amendment.—The omission of the footnote may be cured by amendment, however, and the court on sustaining a demurrer for want of a footnote, should permit the plaintiff to amend.[97]

The form of the footnote is not important: it has been held with reference to a bill apparently containing no interrogating part, that a footnote was sufficient which required the defendant to answer "all the allegations in the foregoing bill, in paragraphs numbered 1 to 5 inclusive;"[98] and if the stating part is properly divided and numbered, it is enough of a footnote to require the defendant "to answer all the statements in the above bill."[99]

§ 300. Footnotes to amendments to bills.—With reference to the effect of an amendment upon a footnote, it is held that if the amendment is a mere interlineation or such matter as might be interlined in the original bill, the footnote has no new office to perform and need not be renewed.[1] And since the purpose of the footnote is to inform the defendant what to answer, a new paragraph may be added to the bill by

[97] Martin v. Hewitt, 44 Ala. 418; Ala. Warehouse Co. v. Jones, 62 Ala. 550, 554.

[98] Paige v. Broadfoot, 100 Ala. 610.

[99] McKenzie v. Baldridge, 49 Ala. 564.

[1] Werborn v. Austin, 82 Ala. 498; Ladd v. Smith, 107 Ala. 506; Prestwood v. Troy Fertilizer Co., 115 Ala. 668; Frey v. Fenn, 126 Ala. 291.

amendment taking the place and number of a paragraph stricken out, without requiring a new footnote.[2] But if the amendment is an addition upon a separate paper filed, the Supreme Court has not decided whether a new footnote is necessary or not.[3] Presumably, however, if the amendment consists of new facts a footnote to the amendment should be added.

§ 301. Waiver of oath to answer: A right in Alabama.—The footnote is the place in which the plaintiff usually waives the defendant's oath to the answer;[4] which he has a right to do if he chooses, unless the bill is a bill for discovery only.[5] But it is allowable to insert the waiver of the defendant's oath in the interrogating part, for the statute says the defendants' oath may be waived "in or upon the bill.[5] But when the bill is filed with a waiver of the defendant's oath inserted in the footnote, an amendment can not be added with an interrogating part to which the defendant's answers under oath are required.[6]

This absolute right in the plaintiff under the Alabama practice to waive the defendant's oath is contrary to the English practice, where the waiver was dependent upon the consent of the court, and was customary in amicable bills only.[7] It was first made a right in Alabama in the Code of 1852; and prior to that time the defendant's oath to the answer was required by statute.[8] It constitutes one of the four fundamental differences between practice in Alabama and the old English practice, and has already been fully discussed.[9]

§ 302. Reason for waiver now abolished if plaintiff swears to bill.—The reason for the introduction of the right to waive the defendant's oath was doubtless the rule that required the testimony of two witnesses or strong corroborating circumstances in addition to the testimony of one witness to over-

[2] Ala. Warehouse Co. v. Jones, 62 Ala. 550.

[3] Prestwood v. Troy Fertilizer Co., 115 Ala. 668.

[4] Russell v. Garrett, 75 Ala. 348; Ladd v. Smith, 107 Ala. 506, 516.

[5] Code of 1907, § 3096.

[5] Russell v. Garrett, 75 Ala. 348.

[6] McCaw v. Barker, 115 Ala. 543.

[7] 1 Daniell Ch. Pr. 431.

[8] Clay's Alabama Digest, 352, § 41, being sec. 8, of the Act of 1823.

[9] See §§ 13-19, supra.

come the denials of an answer under oath as evidence for the defendant. But the Code of 1896 introduced a new section, which is still law, providing that "The rule requiring two witnesses, or one witness and corroborating circumstances, to overcome an answer under oath denying the allegations of the bill, is abolished in all cases where the bill is sworn to by the complainant; and such answer shall have only such weight as evidence as the evidence of such defendant taken upon interrogatories."[10]

Although this statute has not yet been construed by the Supreme Court, there seems to be no good reason why it should not be universally adopted, so that the plaintiff would always be safe in not waiving the defendant's answer under oath. While the defendant's oath alone may not be very valuable today, it is well known that the answer without oath is never prepared with the same care for the truth, the defendant usually making no effort to reply to the bill in detail, but broadly denying the important parts of it, and devoting himself to his defenses. And the plaintiff who has waived the oath is without remedy against such practice, for Chancery Rule 34 provides that "An answer to which the oath of the defendant is waived cannot be excepted to for insufficiency." And the decisions are that an answer without oath is mere pleading.[11]

§ 303. What bills must be sworn to.—Apart from swearing to the bill to get the benefit of this statute, there is no necessity for the plaintiff to swear to his bill unless it be a bill for discovery,[12] or one of several kinds of bills which in their nature require action by the court before the plaintiff has had time to prove his case. Such are bills for injunctions in which temporary injunctions up to the hearing of the cause as well as permanent injunctions are sought;[13] bills for the appointment of receivers;[14] bills praying writs of seizure,[15] and the like.

[10] Code of 1907, § 3117; Code of 1896, § 680.

[11] Ex parte Ashurst, 100 Ala. 573, 578; Watts v. Eufaula Nat. Bank, 76 Ala. 474.

[12] Lawson v. Warren, 89 Ala. 584.

[13] Chancery Rule 15, Code of 1907.

[14] Burgess v. Martin, 111 Ala. 656.

[15] Code of 1907, § 3194, et seq.

§ 304. Manner of swearing to and signing bills.—With reference to the manner of swearing to bills, Chancery Rule 15, Code of 1907, provides that "the oath or affirmation may be administered and certified by any of the officers thereto authorized by law. A bill may be sworn to by an agent or attorney, but the affidavit must set forth a sufficient reason why it is not verified by the complainant himself."[16]

It is not necessary that the affiant as such sign the bill, however; for the certificate of the officer shows that he made oath to it;[17] but in obedience to English practice the bill should be signed by counsel,[18] unless the plaintiff has no counsel, but sues in proprio persona, as he is entitled to do,[19] in which case he should sign the bill.

§ 305. The form of the oath.—The form of the oath has sometimes caused trouble at the hearing or on appeal, especially where the truth of the allegations is based upon the affiant's information and belief. Thus where the affiant swears to the allegations "as true to the best of his knowledge, information and belief," the oath is insufficient; for there is a rule that the oath must be construed most strictly against the affiant,[20] and the affiant does not in such cases swear that he knows the facts to be true. If the bill contains no allegations which it indicates are based upon information and belief only, the plaintiff is himself responsible for the truth of the whole bill, and it is safest for him to swear simply that all the statements of the bill are true. Then there will be no doubt of the sufficiency of the oath.[21] But if the plaintiff is unable to make all the statements of the bill upon his own knowledge, but is compelled to state some things upon information and belief,[22] then, care must be taken; for "When the averment is positive, the verification should be so. When it is upon information and belief, the verification should embrace both the facts that the affiant has been informed and

[16] Kinney v. Reeves, 142 Ala. 604.

[17] Culver v. Guyer, 129 Ala. 602; Watts v. Womack, 44 Ala. 605.

[18] 1 Daniell Ch. Pr. 453.

[19] Constitution of Alabama 1901, § 10.

[20] Burgess v. Martin, 111 Ala. 656; Globe Iron Roofing Co. v. Thatcher, 87 Ala. 458.

[21] Kinney v. Reeves, 142 Ala. 604.

[22] See § 208, supra.

believes them to be true, either in terms, or by affirming positively that the facts alleged in the bill are true as therein stated."[23]

It must be noted, however, that when the bill is one which must be sworn to, the facts must be unqualifiedly sworn to. Thus, upon a motion for a receiver the bill showed that the plaintiff "was informed and believed, and upon such information and belief averred" that the debtor was insolvent and was converting the property. Herein was the gist of the motion; and while the oath was correctly worded to the effect "that the matters and things alleged in the foregoing bill as facts are true, and those alleged upon information and belief he believes to be true," the facts themselves were nowhere positively stated, and so the motion for a receiver was denied.[24]

§ 306. Exhibits to bills.—Finally at the end of a bill there are not infrequently found what are called exhibits. These consist of copies of deeds, writings, promissory notes, powers of attorney, or statements of accounts which form the basis or important evidence in a suit, and which will require frequent consideration in the pleadings, or at the trial, but which are too long to set out word for word in the body of the bill. Alabama Chancery Rule 16, Code of 1907, provides that "The copies of all documents appended as exhibits to bills, petitions, and answers shall be deemed and taken and held as parts of bills, petitions, and answers; and the admission of such exhibits in the answer dispenses with proof thereof."

The exhibits should not be the original writings but copies of them; for the originals might be lost. The originals may be filed with the register, together with affidavits proving them, thirty days before the hearing;[25] or the exhibits may be proved viva voce at the hearing if the opposing solicitor is given one day's notice;[26] and then proof that the exhibits are copies will be sufficient without production of the originals, if the originals are shown to have been lost.[27]

[23] Burgess v. Martin, 111 Ala. 656.

[24] Schilcer v. Brock & Spight, 124 Ala. 626.

[25] Code of 1907, § 3144.

[26] Chancery Rule 64, Code of 1907; Carradine v. O'Connor, 23 Ala. 573; Pierce v. Prude, 3 Ala. 65.

[27] Dawson v. Burrus, 73 Ala. 111.

Exhibits must be marked for identification, and letters of the alphabet are usually employed for this purpose; thus Exhibit A, Exhibit B, &c.; and it is customary for the pleader resorting to their use to state in the parts of his bill to which they severally apply that copies of the instruments or writings in question have been attached to the bill as exhibits marked Exhibit A, &c.; that he prays they may be taken as parts of the bill and that he may refer to them as often as may be necessary in the cause.[28]

So completely are the exhibits then a part of the bill, that "whatever is found in them must be taken as a part of the statement of the facts on which the suit is founded;"[29] and if the matters in the exhibits and the matter in the bill are repugnant, the bill is subject to demurrer on that ground.[30]

[28] Minter v. Branch Bank of Mobile, 23 Ala. 762.

[29] Per Peters, J., in Bunkley v. Lynch, 47 Ala. 210; Minter v. Branch Bank of Mobile, 23 Ala. 762.

[30] Barrett v. Central Building & Loan Assn. 130 Ala. 294; Little v. Snedecor, 52 Ala. 167.

CHAPTER X.

Of Bringing the Defendant Into Court.

§ 307. Issue and return of summons.—When the bill has been properly prepared, and filed in the office of the register of the proper district or county,[1] it is the duty of the register to issue forthwith a summons, together with a copy of it to be left with each defendant against whom publication is not shown to be necessary, "requiring him to appear and demur, plead to, or answer the bill within thirty days after service." [2] This summons is directed to the sheriff of the county, and requires him to serve it upon the defendant personally if the defendant is to be found in his county, and not merely leave the copy at the defendant's residence. The sheriff or his deputy making the service, must endorse the fact of personal service upon the original summons, with the date upon which is was accomplished, and return the original to the register within five days thereafter, leaving the copy with the defendant.[3]

§ 308. Practice when defendant resides in another county.—When the defendant or any of several defendants resides in another county in the State, if the bill does not show the fact, the register should be notified of the place of such defendant's residence if known to the plaintiff. The practice then seems to be for the register merely to note upon the back or margin of the summons that the particular defendant resides in the other county. The sheriff of the county in which the suit is filed then sends the summons to the sheriff of the other county together with the copy for the defendant. That sheriff then endorses the fact and date of service upon the original summons and returns it to the sheriff of the county of its issue, who keeps a full record of the transaction; and he returns it to the register of the chancery court. But this practice though not contrary to the wording of the statute, is evi-

[1] See Chapter II, supra.
[2] Code of 1907, § 3097.
[3] Code of 1907, § 3098

dently not contemplated by it. For while no chancery statute directs to which sheriff the register shall send the summons for the resident of the other county, section 3099 of the Code of 1907 provides that "when the summons is executed in any other county than the one in which the court from which the same issues, is held, the return may be made by mail directed to the register, the title of the suit being endorsed on the envelope, and the word 'Summons' written against the same." And section 3100 provides that when the return is made by mail, it must be deposited in the postoffice of the county in which it is executed within five days after execution. This practice is of course incompatible with the practice of the register's sending the summons first to the sheriff of the county of issue, and his sending it to the other county; for if it came back directly to the register instead of to the sheriff of the county of issue, it would be impossible for the sheriff to keep accurate book records of the issue and return. It is apparent also that the time required to obtain service and legal return is made some greater by the practice in vogue than it would be if the register communicated with the sheriff of the other county directly.

§ 309. Defendant need not be served with bill.—The register is not required to furnish the sheriff with a copy of the bill to serve upon the defendant; but after being served, or after being brought into court by publication, the defendant may obtain a copy of the bill by applying to the register, to be taxed as costs in the cause.[4]

§ 310. Record must show service, appearance, or consent of defendant—Unless the defendant appears without being served the record of the cause must show service upon him or the cause will be reversed on error; but if the decree or other part of the record indicates that the defendant was consenting without expressly saying so, the cause will be remanded for correction of the record.[5] On collateral attack, however, after a great lapse of time it was held that service would be presumed even though the record bore no evidence of it;[6] but the decree in question was a divorce decree of an-

[4] Code of 1907, §§ 3098, 3102.
[5] Kirk v. McAllister, 39 Ala. 343.
[6] Wilson v. Holt, 83 Ala.

other state; so too much reliance might be put upon it as a general proposition applicable to collateral attack generally.

§ 311. What is sufficient return.—As to sufficiency of the return of service, the old proposition is supported that a variance in the middle name between the subpoena and return is immaterial;[7] and it has also been held that where the summons recites the defendants by name, the return is sufficient although the endorsement by the sheriff is merely, "Executed on the parties, this October the first 1870, with copy."[8] All returns being a part of the sheriff's official duty are presumed to have been made under oath, and until set aside by the court, or disproved in a proper case, impart "verity as absolute as any other matter which goes to make up the records of the court."[9]

§ 312. Appearing and defending waives service.—An adult defendant can appear and defend and thereby waive the necessity of service.[10] And where the waiver is in writing upon the bill itself by one acting as solicitor for the defendant, it has been held sufficient, the court presuming that one acting as solicitor is properly authorized.[11] Even if there was no intention to waive proper service, appearing and defending without objection waives all irregularities.[12] So it has been held that the recital in a decree pro confesso that "the parties came" is sufficient on collateral attack to show the appearance of a resident defendant when his name is mentioned with the other defendants in the margin of the minute entry of the decree.[13] But an entry "the parties consenting" is not enough even on appeal to show the appearance of a non resident defendant against whom publication was had and a decree pro confesso omitted.[14]

There is no formal appearance day provided in Alabama chancery procedure, so unless the defendant is present in open court by himself or his solicitor at the hearing, he can-

[7] Cleveland v. Pollard, 37 Ala. 556.

[8] Florence v. Upshaw, 50 Ala. 28.

[9] Dunklin v. Wilson, 64 Ala. 162.

[10] Harrison v. Harrison, 20 Ala. 629; Byrd v. McDaniel, 26 Ala. 582.

[11] Jones v. Beverly, 45 Ala. 161.

[12] Cullom v. Batre, 2 Ala. 415; Winter v. Rose, 32 Ala. 447.

[13] Hunt v. Ellison, 32 Ala. 173.

[14] Holly v. Bass, 63 Ala. 387.

not make an appearance without filing some pleading. Any pleading to the cause is sufficient, however; as the filing of a demurrer.[15]

§ 313. How adult insane defendant is brought into court.— The methods provided by statute for serving and bringing into court adult insane defendants and infant defendants required to be discussed in Part II of Chapter III in connection with their being made parties defendant to the bill; and it is needless to do more than refer to that here.

In the case of the adult insane defendant, if a resident, he must be personally served with process of summons, and if he has a legally appointed resident guardian, the guardian having been made a party defendant, too, must also be served.[16]

If the adult insane defendant has no guardian, after having been duly served with process, a guardian ad litem must be appointed for him by the court thirty days after the perfection of service, proceeding in the same manner as it proceeds to appoint a guardian ad litem for a minor over fourteen years of age who fails to select a guardian ad litem.[17] This requires an affidavit of the defendant's insanity, or an oath to the bill alleging the insanity, and the consent in writing by the proposed guardian ad litem to act. And since section 3101 of the Code provides that the guardian ad litem is to be appointed exactly as one is appointed for infant defendants over fourteen years old, the new sections of the Code of 1907 applicable to infants must apply to insane defendants too.[18] So the court must appoint some person qualified to act as solicitor for the insane defendant; but must not knowingly appoint as guardian ad litem any person "who is related either by blood or marriage within the fourth degree" to either the plaintiff or his solicitor, or to the judge or clerk of the court, or any one connected in any way with the plaintiff or his solicitor. And it is made illegal for the plaintiff

[15] Ex parte Henderson, 84 Ala. 36.

[16] See § 89, ante, and especially footnote (84) to that paragraph.

[17] Section 3101, Code of 1907; sec. 685, Code of 1896. Chancery Rule 23, Code of 1907. See § 85 et seq., ante.

[18] Secs. 4482, 4483, 4484, Code of 1907. Compare §§ 92, 93, supra.

or his solicitor even to suggest a guardian ad litem, and for the court to appoint upon such suggestion.

§ 314. How infant defendants are brought into court.—Infant defendants of whatever age must be served with process by serving their parents, or either of them, if in life and not interested in the cause adversely to the infant; and if they are both dead, then by serving the general guardian of the infant if there is one, and the guardian is not himself interested in the cause adversely to the infant. If the infant has neither parent or guardian, or if they are interested adversely to the infant, then an infant over fourteen years old must be served personally, and an infant under fourteen must be served by serving the summons upon the person who has the maintenance and charge of him, unless opposed in interest. And if there be any case not provided for by statute or rule, upon proof being made to the chancellor he is authorized to direct the mode of service, or to appoint a guardian ad litem without service being first had upon the infant.[19]

If the infant has a general guardian who is not interested adversely to him, the general guardian must defend for him, and a guardian ad litem cannot be appointed.[20] But if there is no general guardian, or if there is one, and he is interested adversely, a guardian ad litem must be appointed by the court in accordance with the provisions of Chancery Rule 23 of the Code.

The court must appoint some solicitor, however, so as to avoid the necessity for the guardian ad litem to employ counsel, and the court must not knowingly appoint a relative of the plaintiff or of his solicitor, or of the judge or of the clerk, or any person connected with the plaintiff or his solicitor in any manner; and the court must not appoint upon the suggestion of the plaintiff or of his solicitor; nor must they offer suggestion; all of which is prevented by statutes supported by penalties enforceable at the suit of the infant either suing by next friend or after he becomes of age.[21]

[19] Chancery Rule 20, Code of 1907. And see § 91, et seq., ante.

[20] Section 4482, Code of 1907. See § 91, et seq., ante.

[21] Code of 1907, §§ 4482, 4483, 4484.

§ 315. How infant defendants are brought into court (continued).—Sometimes it is difficult to tell before the parties have been brought into court whether the infant's interests and those of his parents or guardian are adverse. So the plan has been recommended by Chancellor Benners of serving the parent or guardian for the infant as if not interested adversely, and then at the same time serving the infant himself also, if he is over fourteen; otherwise delay for new service is sometimes occasioned. If he is under fourteen the court can appoint a guardian ad litem for him under Chancery Rule 20 without service, as soon as the guardian's interest appears to be adverse; since no personal service upon an infant under fourteen is ever required.

An infant defendant over fourteen has a right to select his own guardian ad litem, so there must be no attempt to appoint one until the thirty days for pleading are over; since until the end of that time it cannot be presumed that the infant will not appear in court and ask a special appointment.[22] And of course the infant cannot bind himself by waiver before the expiration of the time.

§ 316. Non-resident defendants: when publication provided for.—Non-resident defendants when caught within the State may be served personally without publication;[23] but "if any defendant is shown to be a non-resident, or if his residence is unknown * * * the register must on proof thereof by affidavit, make out and superintend the execution of the appropriate order of publication."[24] The place of publication seems to be discretionary with the register or chancellor.[25] And in all cases where publication is necessary the sufficient amount of money to defray the cost of publication must be deposited with the register, or on failure to make the deposit after thirty days notice, the bill may be dismissed.[26]

§ 317. Jurisdiction against non-residents by publication purely statutory.—This jurisdiction against non-residents by publication is of course unenforceable except upon property

[22] See § 101, ante.
[23] Sec. 3103, Code of 1907.
[24] Sec. 3104, Code of 1907.
[25] Mobley v. Leophart, 51 Ala. 587.
[26] Sec. 3105, Code of 1907.

of the non-resident situated in Alabama;[27] and even as to that is entirely statutory; so that the forms must be strictly observed, or the final decree will be invalid.[28]

And this same jurisdiction may be obtained against unknown defendants when the plaintiff alleges upon affidavit that interests in the suit are vested in such persons whom he does not know and whose names and residences he has not been able to find out even by diligent inquiry. Publication must be made against them, however, describing them as nearly as may be.[29]

§ 318. Non-resident's age must be given.—When the age of the non-resident is known to the plaintiff, that is, whether or not the non-resident is a minor, it must be stated in the affidavit or sworn bill, or the affiant's ignorance declared, as a predicate for the appointment of a guardian ad litem.[30]

§ 319. Order of publication: notice.—Orders of publication must be made by the chancellor, but the register can make them in vacation. And they must designate the newspaper in which the publication shall appear. The order itself should be so drawn that it may be published as notice; for Chancery Rule 22 requires that the order be published once a week for four consecutive weeks, and that a copy be posted at the door of the court house, or other place where the court sits; and also that a copy be mailed to the non-resident defendant twenty days after the order is made; and compliance with all this must be strictly observed.[31]

§ 320. Absconding resident defendants.—Service may be had by publication also upon resident defendants who have been absent from the State more than six months from the filing of the bill, or when the defendant conceals himself so that process cannot be served upon him; in both of which

[27] See § 41, et seq., ante.

[28] Sayre v. Elyton Land Co. 73 Ala. 85, is the leading case. For a discussion of this case, as well as the whole subject of final decrees upon decrees pro confesso without personal service, see Chapter XIII, post.

[29] Sec. 3106, Code of 1907, City of Opelika v. Daniell, 59 Ala. 211; Bell v. Hall, 76 Ala. 546; Bingham v. Jones, 84 Ala. 202.

[30] Sec. 3104, Code of 1907.

[31] Butler v. Butler, 11 Ala. 668; Cullom v. Branch Bank of Mobile, 23 Ala. 797; Curry v. Falkner, 51 Ala. 564; Paulling v. Creagh, 63 Ala. 398.

cases the proof is by affidavit only.[32] But in the latter case. that of the absconding defendant, he is regarded as a resident of this State seeking fraudulently to avoid the jurisdiction;[33] and the decree would probably bind him personally.

§ 321. Corporations made defendants.—When Alabama corporations are made defendants, service of process may be executed upon "the president, or other head thereof, secretary, cashier, or managing agent thereof." And if affidavit is made that those officers are unknown, are absent from the State, or are non-residents, the process may be served upon any white person in the employ of the corporation or doing business for it.[34] Foreign corporations when sued may be summoned by serving process upon "any agent of such corporation or white person in its employ in this State," Or it may be treated like non-resident individuals and be brought into court by publication; in which case the copy of the order may be sent to any of the officers named above. But if the summons is served on the agent or employee of the foreign corporation, that agent or employee may be required to answer the bill under oath and under like penalties as other defendants to bills.[34] Summons to a municipal corporation made a party defendant should be served upon the mayor.[35]

In all instances, however, whether the defendant corporation be domestic, foreign, or municipal, the return of the sheriff is not evidence of the official position or agency for the defendant of the person served. Before a decree pro confesso can be taken the fact that the defendant was served through the proper person must be proved by independent proof.[36] The affidavit of an outsider would probably be sufficient, however.

§ 322. All defendants must be brought into court before cause proceeds.—Finally, whenever there are more than one

[32]Sec. 3104, Code of 1907; Chancery Rule 22, Code of 1907; Glover v. Glover, 18 Ala. 367.

[33] Glover v. Glover, 18 Ala. 367.

[34] Chancery Rule 21, Code of 1907.

[35] Lyon v. Lorant et al., 3 Ala. 151.

[36] Independent Pub. Co. v Am. Press. Assn., 102 Ala. 475, 480; Lyon v. Lorant et al., 3 Ala. 151; Agee v. Oxanna Building Assn., 99 Ala. 571, 591.

defendant, all must be in court either by service of summons or by publication before the cause can proceed.[37]

§ 323. Compelling answer by attachment or sequestration.—To compel the defendant to answer when he fails or refuses to do so, the plaintiff, if he has not waived the defendant's oath, can attach him by order of court, have him arrested by the sheriff, and brought before the court, a circuit judge, or the register. But the defendant may be then released upon giving approved bond to file an answer.[38] If he fails to give bond, however, he will be kept in prison until he answers.[39] But these proceedings are comparatively rare in Alabama and there seem to be no decisions upon them.

"If a defendant against whose body an attachment has been issued to enforce an answer, eludes the service thereof," Rule 25 of Chancery practice in the Code of 1907 provides that "upon affidavit of the fact by the sheriff or his deputy, and by the complainant or his solicitor, of the necessity for an answer to the bill, the register shall issue a writ of sequestration against the estate of such defendant, directed to any sheriff of the State of Alabama."

§ 324. When defendants property may be attached in aid of suit.—There are cases in which the plaintiff is entitled to the relief of a court of equity but suit would be fruitless without some way to hold the defendant's property then situated within the State pending the determination of the claim. Such cases in equity correspond to cases at law in which the plaintiff is entitled to institute attachment or garnishment proceedings; and so whenever a suit is filed in equity to enforce a claim for money or damages of which that court has cognizance, as a suit by a cestui against an unfaithful trustee, or a suit upon a partnership relation in which there are no firm assets remaining, or a suit by a surety against his principal, or a suit for equitable remuneration when the situation of the defendant or his financial condition is such that a person suing him at law might institute attachment or garnishment proceedings against him, the same proceedings

[37] So. Building & Loan Assn., v. Riddle, 129 Ala. 562.

[38] Secs. 3108, 3109, Code of 1907; Chancery Rule 24, Code of 1907.

[39] Sec. 3111, Code of 1907.

may be instituted in aid of the equity suit, and property or effects of the defendant both legal and equitable may be held pending the decree in the cause.[40]

§ 325. Difference from attachments at law.—To obtain an equitable attachment an affidavit must be made that a legal ground for attachment exists, an indemnifying bond must be given, and all other requirements for the issue of attachments by courts of law must be complied with [41] except that "chancellors may in vacation examine all answers in relation to attachments returnable into chancery, and discharge or reduce any levy made on application and reasonable notice to the adverse party,"[42] and that "chancellors, circuit judges, and registers of the court in which the bill is filed" may make all orders for the issuing of the equitable attachments and the sale of personal property levied on.[43] But although the register may issue the attachment he must also make an order allowing its issue, if one has not been made by the chancellor, for the issue without the order allowing it is void.[44]

§ 326. Copy of bill must be served with summons if attachment issues.—Moreover in suits in equity upon which equitable attachments are sued out a copy of the bill must be served upon the defendants along with the summons.[45]

§ 327. Attachment of non-resident's property without personal service is procedure in rem.—It is apparent that the chief instances in which attachments will be issued in aid of suits in equity, are those where the defendant is a resident of the State but has absconded, and those where the defendant, though within reach of personal service of process, is about to dispose of his property or remove it from reach of execution of any decree in the cause.[46] But attachments may also be resorted to when the defendant is a non-resident, and can

[40] Sec. 3179, et seq.; sec. 3189, Code of 1907; Smith v. Moore, 35 Ala. 76; Ware v. Seasongood, 92 Ala. 152.

[41] Sec. 3179, Code of 1907. Even the oath must be made that the attachment is not sued out to harass the defendant. Saunders v. Cavett, 38 Ala. 51.

[42] Sec. 3180, Code of 1907.

[43] Sec. 3188, Code of 1907.

[44] McKenzie v. Bentley, 30 Ala. 139.

[45] Sec. 3183, Code of 1907.

[46] Sec. 2925, Code of 1907.

be brought into court by publication only;[47] and in such a case the proceeding is essentially a proceeding against the property, or a proceeding in rem; for a decree is not binding against a non-resident not appearing who has not been served with process, except to the extent of the property attached.[48] The fact that the suit against the non-resident defendant, although begun by attachment, proceeds by bill and answer like a suit in personam, does not change its essential character as an action in rem.[49] "It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property."[50] A judgment against the person of the defendant would be void for lack of jurisdiction of his person.[51] Nor can such a judgment be made effective against property of the non-resident subsequently found or subsequently brought into the State; for the court's "jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or his subsequent acquisition of it. The judgment if void when rendered will always remain void."[52] The form of the procedure, then, is purely incidental to the gist of the action, and must be followed only because it is the only way provided by statute for proceeding against non-residents.[53]

§ 328. Attachment not necessary in suits affecting real estate.—But the practitioner must not be misled by the recent

[47] Sec. 2925, sub. § 1, Code of 1907.

[48] Exchange Bank of Spokane v. Clement, 109 Ala. 270, overruling Betancourt v. Eberlin, 71 Ala. 461; Soulard v. Vacuum Oil Co. 109 Ala. 387; L. & N. R. R. Co. v. Nash, 118 Ala. 477; Pullman Palace Car Co. v. Harrison, 122 Ala. 149; So. Ry. Co. v. Ward, 123 Ala. 400; Kress v. Porter, 132 Ala. 577.

[49] Exchange Bank of Spokane v. Clement, 109 Ala. 270.

[50] Per Field J., in Pennoyer v. Neff, 95 U. S. 723.

[51] L. & N. R. R. Co. v. Nash, 118 Ala. 477; So. Ry. Co. v. Ward, 123 Ala. 400.

[52] Per Field J., in Pennoyer v. Neff, 95 U. S. 728.

[53] Sayre v. Elyton Land Co., 73 Ala. 85.

Alabama decisions above cited and the language quoted from the Supreme Court of the United States, and think that a non-resident cannot be sued in chancery upon claims affecting real estate in Alabama without attaching the title of the defendant to the real estate brought into litigation. While the language of those recent decisions, notably that of Louisville & Nashville Railroad Co. v. Nash,[54] and that in Southern Railway Co. v. Ward,[55] was not framed with full consideration of the the practice to sue a non-resident to foreclose a vendor's lien on real estate, or to sell land for a division without attaching the land; yet it will hardly be pretended that attachment in such equity cases is now necessary. The principle involved is that the State is acting upon the non-resident's interest in the land, rather than upon his person, even though the technicalities of a proceeding in rem are entirely wanting. The interesting point is how far all litigation concerning real estate must of necessity partake of procedure in rem.

[54] 118 Ala. 484.

[55] 123 Ala. 404.

CHAPTER XI.

Amendments to Bills.

§ 329. The necessity for amending the bill.—Before proceeding further with the progress of a cause it is well to recognize the fact that a majority of bills require amendment at some time during the litigation. Not infrequently the necessity for amendment is due to the haste or carelessness with which the original bill was prepared; and too much condemnation cannot be made of such faults. Unless an injunction is to be obtained, or an attachment or a garnishment is to be issued, or other preliminary relief requires haste, nothing is more costly than haste in the beginning of a cause. The legal delay incident to properly amending is often a great disadvantage. But apart from that penalty it is difficult to make a bill by amendment as good a bill as it could have been made at first. Often the whole theory should be changed; and sometimes this cannot be done. Undoubtedly the best practitioner is the one who makes the fewest amendments and whose bills remain unchanged until final decree.

But there are many cases in which haste in preparation of the bill, however unfortunate, is excusable, and many others in which later study reveals an honest mistake. Moreover it is the practice, as we shall see, to offset by amendment to the bill any facts set up in the answer which would otherwise require a replication. So the subject of amendments to bills is very important, and the limitations upon the right to amend must be carefully studied.

§ 330. The present statute.—Under Alabama practice "Amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief," the right when availed of late in the cause being subject to the imposition of terms by the chancellor, not extending beyond the payment of all the costs.[1]

[1] Code of 1907, § 3126.

§ 331. Earlier practice.—This practice seems to date from the statute of 1858.[2] Prior thereto in Alabama "any other than formal amendments, it was against the practice of the court to allow, after the case was at issue."[3] This early practice followed the still earlier English practice, which as a rule did not allow amendments after issue had been joined; and certainly not after publication of the testimony.[4] But after the revised edition of English chancery orders of 1828, issued in 1831, orders for leave to amend bills were usually granted on the application of the plaintiff, subject to payment of costs at any period of the cause previous to the hearing, or even later; and this was confirmed by the 64th order of May, 1845,[5] so that in fact long before the early Alabama practice above noted, it was very easy to get amendments allowed in the English courts; and the Alabama courts should have allowed them at any period of the cause likewise, since their professed intention all along was to conform to English practice.[6]

§ 332. Early limitations upon scope of amendment.—But a much greater misconception of English rules early showed itself in Alabama in the limitation of the matter of amendments. In McKinley v. Irvine, in 1848[7] the court said, "The rule [upon amendments] has never been carried so far within our knowledge as to permit a party under such circumstances, to amend as to substantial averments respecting his title;" and much later Chief Justice Brickell, commenting upon the effect of the Alabama statute of 1858, referred to the limitations formerly recognized in Alabama in language which shows that they were singularly severe. "At no stage of the cause could an amendment be allowed, which was repugnant to, or inconsistent with the original bill, or which introduced a new case."[8]

[2] Acts of Ala. 1858–9, 130. Compare Exparte Ashurst, 100 Ala. 573.

[3] Per Brickell, C. J., in Pitts v. Powledge, 56 Ala. 147.

[4] Bryant v. Peters, 3 Ala. 160, 171; 1 Daniell Ch. Pr. 459.

[5] 1 Daniell Ch. Pr. 468. et seq.

[6] See language of the court in Bryant v. Peters, 3 Ala. 160, 171.

[7] 13 Ala. 681, 707.

[8] See language in Pitts v. Powledge, 56 Ala. 150.

§ 333. English practice much broader.—Such seems not to have been the English practice, however, at any time. In England great latitude was allowed the plaintiff in making an amendment; and with the restriction that he could not generally introduce facts which came to pass after the filing of his bill, he could even change the character of his suit entirely.[9] Daniell observed that if a plaintiff took "advantage of an order to amend so as to entirely change his case and to make the bill a perfectly new one, he" would "be ordered upon motion, to place the defendant in the same position, with regard to costs, that he would have been in had the plaintiff, instead of amending, dismissed his original bill with costs and filed a new one."[10] But this did not limit the scope of the amendment.

§ 334. Former limitation in Alabama somewhat relaxed.—The Alabama practice, after the statute of 1858, which, as said above, has come down to us practically unchanged by subsequent Codes, has been construed to be more liberal than the old, but is still nothing like so broad as was the English. So it will be necessary to divide the subject of amendments to bills in Alabama practice into the matter of amendments and the time, form, and method of taking amendments; and since the plaintiff's first step is to determine whether it will be possible to insert in his bill additional matters which he finds materially affect his cause, the matter of amendments will be taken up first.

§ 335. The matter of amendments: Rule.—One of the first decisions construing the law in its present form was Pitts v. Powledge,[11] where an original bill was filed by a husband alone to enforce a vendor's lien upon land sold out of his wife's separate estate the purchase money note for which had been taken in the husband's name. The court allowed an amendment which joined the wife as co-plaintiff and alleged that the land belonged to her statutory separate estate;[12] and Chief Justice Brickell, who rendered the opinion, said: "If

[9] 1 Daniell Ch. Pr. 463.
[10] 1 Daniell Ch. Pr. 468.
[11] 56 Ala. 147.
[12] At present the statutory separate estate of a married woman in Alabama is under her sole control, so that she would sue alone concerning it.

there is not an entirely new case made, or a radical departure from the cause of action stated in the original bill, or an entire change of parties wrought, the right to amend is coextensive with the error which may be committed."

These limitations, which seem to have been entirely unwarranted by the wording of the statute, may be accounted for by the language of Justice Stone in the slightly earlier case of Moore v. Alvis,[13] He said, "We think we may safely affirm that the legislature, in the statute we are construing, intended to make the rule of amendments in chancery conform substantially to the rule theretofore declared governing amendments of pleadings in suits at law."

The decision in Pitts v. Powledge was made in 1876, and there have been a great many decisions of the Supreme Court between then and the present time; but except for some elaboration of the meaning of the terms "entirely new case" and "radical departure," it is believed that the abstract proposition laid down in Pitts v. Powledge contains the law of to-day. Later decisions may be found in conflict in conclusions upon the facts, but all are practically in harmony upon the law of that early case. The irreconcilable division in the Supreme Court upon the subject of amendments during the year 1907 seems to have arisen upon deducing corollaries from this generally recognized rule.

§ 336. Departures by application of the rule.—In Scott v. Ware,[14] it was sought to amend an original bill by a creditor in behalf of himself and other creditors to subject lands devised so as to forclose under the bill as amended a mortgage claimed by the plaintiff individually; and the court disallowed the amendment saying, "amendments to original bills cannot be allowed, and made the basis of relief, which change the entire character of the suit, and the character in which the complainant originally sues."

So in Ward v. Patton[15] it was held that a creditor's bill to redeem from an execution sale could not be amended into a bill to enforce an alleged trust in lands arising from

[13] 54 Ala. 356.
[14] Scott v. Ware, 64 Ala. 174.
[15] 75 Ala. 207.

an agreement between creditors, or into a bill directed to recover damages because an alienation of the land pending suit prevented the enforcement of the trust. The former purpose of the bill was departed from.

So it was held impossible to amend a bill directed to setting aside a guardian's settlement in the probate court as fraudulent into a bill to compel his settlement in the chancery court.[16]

So in the recent case of Force v. Age-Herald Co.[17] it was held that a bill filed by a creditor of a corporation to charge the individual stockholders as having used the assets of the company to satisfy their individual indebtedness as subscribers to the stock of a new company, the first company being insolvent and the dissipation of its assets therefore fraudulent, could not be amended into a bill to charge the same individual stockholders as sharers in an ultra vires act by the corporation.

§ 337. Contrary decisions as to departures.—But a holding contrary to the last case seems to have been made in Ala. Terminal & Improvement Company v. Hall.[18] There the creditor sought in the original bill to compel the individual stockholders of a corporation to pay their unpaid stock subscription, which had been in effect forgiven them by the president in an unauthorized attempted purchase of their stock for the company with corporate assets; and because the subscriptions were thus shown to be reachable at law, it was held possible to amend the bill and give it equity by averring that the purchase had been ratified by the corporation, thereby converting the bill into a suit to reach the subscriptions as fraudulently released so far as the plaintiff was concerned.

In Winston v. Mitchell,[19] it was held that a bill to charge a defendant as trustee under a resultant trust might be amended so as to charge the defendant with a constructive trust of part of the property sued for. So a bill to enforce specific performance of a contract may be amended so as to

[16] Glass v. Glass, 76 Ala. 368.

[17] 136 Ala. 271.

[18] 152 Ala. 262 (July 1907).

[19] 87 Ala. 395.

make a bill to enforce a resultant trust in the land alleged to have been bought.[20]

A bill to attack a fraudulent conveyance of a debtor's land, may be amended by joining the fraudulent purchasers of his goods and seeking to recover those assets also.[21] A bill to foreclose a mortgage may be converted into a bill to foreclose a vendor's lien.[22] And a bill seeking a sale for division of property held by the plaintiffs and defendants incidental to the dissolution of a partnership may be amended so as to show that the real relation of the parties was merely that of tenants in common.[23]

§ 338. Amendment must not make a new case.—Of course if the amendment must not make a departure from the case made by the bill as a plaintiff at common law must not make a departure in after pleading from the case made by the declaration, a fortiori the amended bill must not present an entirely new cause of action. But in the light of the liberality of the Supreme Court in deciding what is and what is not a departure, as we have seen from the decisions above quoted, it becomes difficult to establish a rule by which to determine what is a new cause of action.

The language of the decisions laying down abstract propositions is not completely satisfying. It was early determined that the matter of the amendment must be within the lis pendens of the original bill.[24] In Collins v. Stix,[25] the court said "An amendment is regarded as making a new and different case when it changes the right and character in which the complainant sues, or varies substantially the kind of relief prayed." And in the last authoritative decision upon the subject, Alabama Terminal & Improvement Co. v. Hall,[26] Mr. Chief Justice Tyson said: "In every case where the amendment is of the subject matter, the question always is: Does the amendment introduce a new cause of action? To

[20] Milner v. Standford, 102 Ala. 277.

[21] Collins v. Stix, 96 Ala. 336.

[22] Truss v. Miller, 116 Ala. 494.

[23] Stein v. McGrath, 116 Ala. 593.

[24] King v. Avery, 37 Ala. 169; Adams v. Phillips, 75 Ala. 461.

[25] 96 Ala. 338.

[26] Ala. Terminal & Imp. Co. v. Hall, 152 Ala. 262. July 1907. The case of Ala. Consolidated

state the question in another form: Is the subject matter of the amendment within the lis pendens of the original complaint or bill? If it is, the amendment must be allowed at any stage of the proceding. If not, it should be rejected, because it introduces a new cause of action; and this without regard to the statute of limitations." And after deciding that the statute of limitations is not a determining factor, he proceeds: "Does it count upon a new and different transaction from that counted on originally? Of course, if the amendment counts upon a different transaction, and therefore introduces a new cause of action, it does not relate back to the commencement of the suit," &c.

§ 339. Amendments relate back and become part of bill.— It was a principle of English chancery pleading, and is also one with us, that the scope of amendments was limited, except in rare instances, to setting forth additional facts which had transpired prior to the filing of the original bill; and therefore the amendment constituted a part of the same record as the original bill, being read into it. Matter occurring after the filing of the original bill had to be brought forward by

Coal & Iron Co. v. Heald, 45 So. Rep. 686, rendered in February 1908, was upon an amendment to a complaint at law. And while the division of the court was upon the general subject of the making by amendment of a new cause of action, the opinion of the majority is not really in point in equity, and to the extent that it is applicable is confirmatory of the opinion of Tyson C. J., in Ala. Terminal & Imp. Co. v. Hall. There was a very illuminating dissenting opinion, however, by Dowdell, J., referred to in a later section of the text, in which he disagreed with the majority and limited lis pendens to the cause of action as described in the original suit. He said: "What is meant by 'within the lis pendens' in the case cited? It is to be remarked that in declaring the rule, from the language employed, it is not intended what might have been, or perhaps what should have been, within the lis pendens, but, on the contrary, that which is intended is, what is actually within the lis pendens? And this is still further emphasized in some of the cases by the employment of the conjunctive clause, 'and within the issues between the parties' * * * What are the issues between the parties? Certainly none others than those tendered by the original complaint, such only as it would be competent to introduce evidence to support."

what was known as a supplemental bill.[27] And while by Rule 45 of Alabama chancery practice "new facts occurring since the filing of a bill may be introduced by way of amendment, without a supplemental bill," unless the amendment is introduced under the statute to take the place of a supplemental bill,[28] it will be taken to relate back to the filing of the bill, and will be allowed if objected to only if properly framed to that end.[29] As said by Brickell, C. J., "The rule is general, in a court of equity, that an original and amended bill are to be regarded simply as an entire bill, constituting in fact but one record. So far as the equity of the bill is involved, the amended bill has relation to the commencement of suit by the filing of the original bill."[30] And this is reiterated in the latest decision.[31]

§ 340. Departure by amendment equivalent to new case.—Now we have already seen that a bill when properly drawn, and indeed as usually drawn, is much more exact than the necessary complaint at law, and contains a full statement of the facts upon which the suit is based.[32] Therefore an amendment could hardly attempt more than its proper function of amplefying the case already stated by the bill,[33] unless it either brings in inconsistent averments or substitutes for the bill an entirely new case. But inconsistent matter, whether in the bill originally or introduced by amendment, vitiates the bill objected to, without regard to how it found its way in,[34] from the impossibility of determining what is true if the bill should be taken as confessed.[35] Inconsistent matter brought in by amendment will even vitiate the bill though the amendment would not make a departure if the

[27] 1 Daniell Ch. Pr. 459.

[28] Rogers v. Haines, 103 Ala. 198; Jones v. McPhillips, 82 Ala. 102, 112.

[29] Ward v. Patton, 75 Ala. 207; Ray v. Womble, 56 Ala. 32.

[30] Adams v. Phillips, 75 Ala. 461.

[31] Ala. Terminal & Imp. Co. v. Hall, 152 Ala. 262.

[32] See § 188 et seq. ante.

[33] Ward v. Patton, 75 Ala. 207; Collins v. Stix, 96 Ala. 338.

[34] Ward v. Patton, 75 Ala. 207; Am. Freehold Land Mtge. Co. v. Sewell, 92 Ala. 163; Friedman v. Fennell, 94 Ala. 570.

[35] Micou v. Ashurst, 55 Ala. 607; Gordon v. Ross, 63 Ala. 363; Caldwell v. King, 76 Ala. 149.

statement it contradicts were stricken out.[36] Hence we are forced to the conclusion that there is no substantial difference between holding an amendment to a bill in equity bad for being a departure and holding it bad for making a new case; the first involves the second.

§ 341. Amending by alternative prayers.—This conclusion is sustained by the law upon amending by inserting new prayers in the alternative—at least prior to the Code of 1907.[37] It was not the office of an amendment to vary substantially the relief prayed;[38] and the limitation upon the scope of alternate prayers was that they both must be consistent with the case made by the bill.[39] But we have seen that every prayer when applicable to the averments, is a substantial part of the case made by the bill.[40] It is therefore apparent that no alternative prayer could be inserted which would involve a departure from the relief sought by the first prayer, and still be consistent with the case made by the bill.

Since the enactment of the new part of section 3095 of the Code of 1907, however, it would seem that the bill can be amended by inserting one or more alternative prayers for inconsistent relief, provided the parties or the subject matter

[36] In Harrison v. Maury, 140 Ala. 523, a bill had been filed to redeem from a vendor's lien, and an amendment was introduced setting forth facts which made the plaintiffs mortgagors to the defendant rather than his vendors, thereby making the suit a bill to redeem from a mortgage. The court held the bill bad on demurrer because of inconsistency, although saying that it could be amended by striking out the allegations making the plaintiffs vendors. This holding was not in conflict with Moore v. Alvis, 54 Ala. 356, which held that a bill to foreclose a vendor's lien might be amended into a bill to foreclose a mortgage.

[37] Code of 1907 § 3095 contains the new provision that "A bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter, or founded on the same contract or transaction, or relating to the same property between the same parties." For a full discussion of the statute see Chapter VIII. ante.

[38] Ward v. Patton, 75 Ala. 207, citing Ray v. Womble, 56 Ala. 32; Glass v. Glass, 76 Ala. 368.

[39] Lyons v. McCurdy, 90 Ala. 497. And see § 291, and § § 240, 241, ante.

[40] See § § 244, et seq, 287, et seq.

are not changed in the same amendment. While this would involve taking the allegations of the bill in a different light, probably it would not be making a different case under the new alternative within the meaning of the majority of the Supreme Court in the recent cases.[41] Although authorized by statute it would seem to be a departure, however.

§ 342. Amending by changing the prayer.—On the other hand, if the amendment is a substitution of an entirely new prayer, without praying in the alternative so as to come within the new part of section 3095 of the Code of 1907, then whether the averments of the bill are amended or not, the rule seems to be that any amendment is allowable which is not repugnant to the main purpose of the bill;[42] and it is of course impossible for any amendment of the relief sought to involve a departure under this rule without at the same time completely changing the case. If the amendment does not involve a departure from the purpose of the bill while it contains the original prayer, a fortiori it does not involve a departure from the purpose of the rest of the bill.

But it is apparent that the decisions are very liberal in construing changes in the relief sought as being within the original purpose of the bill. For instance, a bill to sell for division can be amended into a bill for partition;[43] and a bill to charge stockholders of an insolvent corporation with the amount of their stock subscription as having been released without authority, can be amended into a bill to charge them as fraudulently withholding assets of the corporation.[44]

§ 343. Recent division in Supreme Court opinion inapplicable to chancery.—If then the rule laid down in Pitts v. Powledge[45] and subsequent cases, that an amendment will not be allowed which makes an entirely new case, or a radical de-

[41] Ala. Terminal &c. Co. v. Hall, 152 Ala. 262; Ala. Consol. Coal & Iron Co. v. Heald, 45 So. Rep. 686.

[42] Stein v. McGrath, 116 Ala. 593; Berry v. Tenn. & Coosa R. R. Co. 134 Ala. 618; Ala. Terminal &c. Co. v. Hall, 152 Ala. 262.

[43] Berry v. Tenn. & Coosa R. R. Co. 134 Ala. 618.

[44] Ala. Terminal &c. Co. v. Hall, 152 Ala. 262.

[45] 56 Ala. 147, 150. See § 335, supra.

parture from the cause of action stated in the original bill,[46] is tautological as a rule for equity pleading, in that a departure and a new case in equity are the same thing, then the disagreement in the Supreme Court of Alabama in recent cases involving amendments upon what involves a new case may be set aside as not directly important in chancery if we can find the criterion which has been applied in chancery in identifying departures.

§ 344. Amending by inserting alternative averments.—But before further examining the decisions, let us note one sort of amendment allowable in equity pleading which seems always to involve both a new cause of action and a departure from the case made by the original bill. It is an amendment which inserts alternative averments, facts which go to sustain the plaintiff's right to the relief sought in the original bill but upon different grounds. Such an amendment does not supplant the case made by the bill, but presents another case, sometimes on condition that the first be not true.

This amendment undoubtedly may be made, and by its introduction gives the bill a double aspect.[47] It is held that any averments can be inserted in the alternative by amendment which could have been set forth in the alternative in the bill when originally filed.[48] But while examining in an earlier chapter the more or less uncertain limitations upon pleading in the alternative,[49] the rule laid down by the Supreme Court was found to be that bills are properly framed in a double aspect, embracing alternative averments for relief, when "each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each." Some doubt was expressed whether this rule for alternative averments is

[46] Ward v. Patton, 75 Ala. 207; Adams v. Phillips, 75 Ala. 461. Collins v. Stix, 96 Ala. 338; Truss v. Miller, 116 Ala. 494, 504; Nelson v. First Nat. Bank, 139 Ala. 578; Ala. Terminal Co. v. Hall, 152 Ala. 262. The rule originated in Moore v. Alvis, 54 Ala. 356.

[47] Berry v. Tenn. & Coosa R. R. Co. 134 Ala. 618; Caldwell v. King, 76 Ala. 149; Ward v. Patton, 75 Ala. 207; Pollak v. Muscogee Mfg. Co. 108 Ala. 467.

[48] Wimberly v. Montgomery Fert. Co. 132 Ala. 107.

[49] See § 213 et seq. ante. Chapter VII.

sustained by decisions to its full extent;[50] but if applied in term it would admit no amendment which requires the defendant to procure new evidence in any respect, unless he possesses negative evidence to disprove the new alternative aspect of the bill. And as limitations upon the right of amendment are for the protection of the defendant, it would seem that this principle is not offended even if the right to add alternative averments is an exception to the rule defining the limits of amendments to bills.

Let us now recur to the origin of the present law of amendments and trace the development of the conception of a departure in equity pleading.

§ 345. Right to amend in equity only limited by right at law.—In King v. Avery,[51] Justice Stone first held that since the terms of the then new statute for amendments in chancery were analogous to the provisions of the Code in relation to amendments in suits at law, the same liberal rules of intendment should be applied to the two. As a result it has since been repeatedly held that the legislature intended to make the rule of amendments in chancery conform substantially to the rules and practice prevailing in courts of law.[52] And in accordance with that holding, decisions in courts of law have been very fully cited in determining the limitations of the right of amendment in chancery.[53] And it was believed to be in accord therewith that the rule was reached forbidding an amendment which makes a new case or a complete departure from the case made by the bill. But at most the rule at law was applied by analogy; and although certain new matter would make a new case at law, if it would not make a new case or a departure from the original bill in equity, presumably it would be allowed in an amendment in equity, whatever might be held at law.

§ 346. Difference between complaints and bills.—The essential difference between a complaint at law and a bill in

[50] See § 214, ante.

[51] 37 Ala. 169.

[52] Moore v. Alvis, 54 Ala. 356; Rapier v. Gulf City Paper Co., 69 Ala. 476; Collins v. Stix, 96 Ala. 338.

[53] Compare the opinion in Ala. Terminal & Improvement Co. v. Hall, 152 Ala. 262, July 1907, the last case in equity upon the subject.

equity must not be forgotten. The former is scant and inexact; the latter is full and accurate. Considered from the standpoint of the defendant, supposed to learn the cause of action from the complaint, even the comparatively full declarations at common law would read in the several counts as describing entirely distinct occurrences. Indeed they so recited. A bill in equity, on the other hand, reciting all the facts out of which the claim grew, and in one story or count, necessarily so connects the surrounding data that omitted matters presented by amendment are to a great extent earmarked as of the original transaction. Therefore to admit them could work no surprise, and not to do so might work unnecessary injustice, unless to present a title or right so different that it would not be barred by loss of the original suit.

§ 347. Amendments disallowed as changing title or relation.—Let us now see what amendments have been disallowed in chancery on the ground that they presented new titles or new relations between the parties, and therefore made new cases or departures from the cases made by the original bills:

The Statute of Amendments was enacted in 1858;[54] and the first decision disallowing an amendment under it being apparently King v. Avery.[55] There the original bill was filed by one H. as administrator of one M, suing jointly with E, the sister of M, and seeking an account and division of certain slaves, held by the defendent. Then after the lapse of six years the bill was amended by joining the husband of E, the plaintiff King, and dropping the administrator and the claim of M, thereby making it a suit by King and wife. The court held that the suit was now the suit of King alone, and therefore a new case, since he would get all the benefit of the decree as husband of the claimant; "Although * * * the right to recover depended on the title of Mrs. King * * *; still the suit in its present form must be regarded as the suit of Mr. King, the husband. The authorities so treat it, and go even so far as to hold, that a failure to recover in such a suit would be no bar to a subsequent suit by Mrs. King." In that light the amendment was necessarily disallowed.

[54] Acts of Ala. 1857-8, 230. [55] 37 Ala. 169.

Next in Ray v. Womble,[56] the bill was filed to set aside a sale of plaintiff's land under execution, to cancel the sheriff's deed, and to enjoin an action at law for the recovery of the land, all on the ground of inadequacy of price and irregularities in the sale. It was held impossible to amend it into a bill to regain the land on account of an alleged accepted repayment of the purchase price with an offer to repay the purchase price again. The court unavoidably held that the amendment made a new case and varied the right under which the relief was claimed. It is clear that loss of one suit would not have precluded the other.

Next in Scott v. Ware,[57] a creditor sought in the original bill filed in behalf of himself and all other creditors to reach lands devised by the debtor, and apply them to the plaintiff's claims. An amendment alleged a mortgage to the plaintiff individually and sought to foreclose it. And the court unavoidably held that the amendment made a new case. Very clearly one suit would not have barred the other.

Next in Rapier v. Gulf City Paper Co.[58] a bill to redeem from a mortgage based on ownership of the equity of redemption, was held not amendable into a bill by a judgment creditor to be let in to redeem; "not to acquire the legal estate but that the property may be subjected to sale for satisfaction of the judgment." "There is," said Brickell, C. J., "by the amended bill, a radical departure from the case made by the original bill—a new and different right and title preferred." Again it is clear that the loss of one claim would not bar the other.

Ward v. Patton[59] was begun with an original bill by a judgment creditor to be allowed the statutory right to redeem from another judgment creditor and a purchaser at execution sale certain lands of the debtor; and the bill was then amended to enforce a trust based upon an alleged agreement between the parties in regard to the property. Another amendment set up that pending the suit the land had been sold to an innocent purchaser, and sought to collect damages

[56] 56 Ala. 32.
[57] 64 Ala. 174.
[58] 69 Ala. 476.
[59] 75 Ala. 207.

out of the trustee for breach of the trust, the other parties having been released. It is not clear how the demurrer involved the first amendment; but Brickell, C. J., evidently referred to the first amendment when he said:—"The amendments, * * * departed entirely from the case made by the original bill, introduced an essentially new case, entitling the plaintiff to relief in a different right, upon a different title, and of a different character, from that claimed, or to which he was entitled under the original bill." Of course the loss of a suit to redeem as a judgment creditor would not prevent suing again under the trust agreement.

In Glass v. Glass,[60] the bill was filed to correct the errors of law and fact in a decree in the probate court settling a guardianship. The demurrer raised the point of a remedy at law. The Supreme Court held that as shown by the bill the demurrer was good, adding that they had examined the bill with care to see if it could be amended into a bill to compel the settlement of the guardianship in chancery, but that they were satisfied that "such alteration would work such a radical change, both in the averments and in the relief prayed, that it cannot be allowed."

As the bill did not show that the attempted settlement in the probate court was without the jurisdiction of that court so that the court of chancery could have assumed jurisdiction for a new settlement, on demurrer it must be taken that the probate court had jurisdiction. Therefore the loss of the suit to correct the decree in the probate court did not bar any right to file a new bill in chancery for a settlement there which would show that the settlement in probate was a nullity. The court said that sufficient facts did not appear to ascertain whether the probate court had jurisdiction or not. The decision therefore is not in conflict with the above. Moreover there was no attempt to amend and the court was merely speaking as a guide to justice.

The next case, however, Marshall v. Olds,[61] is clearly an example of an amendment presenting a new case which would not have been barred by the loss of the claim shown in the

[60] 76 Ala. 368.

[61] 86 Ala. 296.

original bill. The original bill sought to enforce a resultant trust to the plaintiff because of an agreement between the defendant and plaintiff's father to use money given by the father to purchase lands for the plaintiff; while the amendment set up a resultant trust in the father, from whom the plaintiff and her brothers and sisters joined in the amendment had jointly inherited.

Lastly in Gardner v. Knight,[62] an amendment seems to have been made which converted a bill for the cancellation of a deed into a bill for specific performance, and the court, by McClellan, C. J., held that the amendment wrought a new cause of action.

§ 348. But amendments changing title not always disallowed: conclusions.—Unless other decisions can be found contrary to the above, there seem to have been no decisions in the Supreme Court disallowing amendments as making new cases or departures where the new rights made by the amendments could not have been enforced after the first suits had been lost. In reaching this conclusion, however, it is not contended that no amendments have been allowed to bills in chancery which amounted to making new cases out of the suits. It has been held that a bill to enforce specific performance of a contract may be amended into a bill to enforce a resultant trust.[63] It has been held that a bill to enforce a vendor's lien may be amended into a bill to enforce an equitable mortgage, it appearing that the facts alleged in the bill did not amount to a vendor's lien.[64] It is held that a bill to remove clouds from a title may be amended into a statutory bill to quiet title.[65] And it is held that a creditor's bill to reach unpaid stock subscriptions as not released by the corporation, may be amended into a bill to reach the subscriptions as released but so constituting a fraud on the plaintiff.[66] In each of these cases the court held that practically the same right was being presented and that there was no departure;

[62] 124 Ala. 273.

[63] Milner v. Standford, 102 Ala. 277.

[64] Smith v. Hiles-Carver Co., 107 Ala. 272.

[65] Smith v. Gordon, 136 Ala. 495.

[66] Ala. Terminal &c. Co. v. Hall, 152 Ala. 262.

but if the amendments in the several cases had not been presented, and the original bills had been lost for failure of the proof, it would have been difficult for the court to hold that the cases presented in the amendments could not be brought anew.

But it may be noted that the statute of limitations was not set up against the amendments in any of these latter cases: from which it may be concluded that if the defenses to an amended bill are the same as to the original, that is, if the statute of limitations has not run upon the new title set up by the amendment, and if the new case is substituted for the original, and therefore does not bring in an alternative prayer making the bill itself contradictory in purpose or multifarious,[67] the court will be inclined to hold that no departure has been created. On principle, however, it would seem that the lapse of time is not a determining factor,[68] and that the sole criterion for determining whether an amendment works a departure is whether the new title or case presented by the amendment could be enforced in a new bill if the original suit should be lost.

§ 349. Recent conflicting decisions upon amendments at law.—That brings us to the recent division of opinion in the Supreme Court of Alabama upon amendments to complaints at law.

In Central of Georgia R. R. Co. v. Foshee,[69] a complaint for personal injury through negligence was amended by adding a new count charging wanton negligence on the part of the defendant, and it was held to have been properly amended, the court saying, apparently for the first time, "that so long as counts added by amendment set up the same general transactions or occurrences upon which the original complaint relied for recovery they do not introduce an entirely new cause of action, and are not objectionable though the form of action may be changed by them as from trover to case, or vice versa, or from case to trespass, etc., etc.; and they further serve to differentiate the rule of amendments prescribed by

[67] Compare Parsons v. Johnson, 84 Ala. 254.

[68] Compare the opinion of Tyson, C. J., in Ala. Terminal &c. Co. v. Hall, 152 Ala. 262.

[69] 125 Ala. 199, 225.

the statute as construed by this court from the rule against departures in after pleading from the case made by the complaint. It is no objection to an amendment that it works a departure from the original complaint within the meaning of the rule last referred to. The amendments under consideration in most of the cases referred to would have been vicious departures in pleading if the facts they introduced had been replied to a plea to the original complaint." It must be noted, however, that the original complaint in the case had contained a bad count upon wanton negligence; so the new count was not a new transaction.

Later in Nelson v. First Nat. Bank of Montgomery,[70] it was sought to amend the original complaint for money had and received by adding a new count for goods sold and delivered, in which was the averment that the transactions were the same. Meanwhile, however, the period of limitation had run against the new case if it could not be introduced by amendment; and this the court refused to allow. Mr. Justice Dowdell in delivering the opinion, said: "It seems to be the settled rule that the amendment, in order to come within the doctrine of relation back to the commencement of the suit, must be but a varying form or expression of the claim or cause of action sued on, and the subject matter of the amendment wholly within the lis pendens of the original suit." The opinion reviewed many cases in chancery; for many decisions at law had said that the rules for amending pleadings at law and in chancery are the same; although the early opinions did not warrant such a conclusion when they held that the rule in chancery should follow substantially the rules prevailing in courts of law.[71]

The next case in which the subject was discussed was Alabama Terminal and Improvement Company, v. Hall,[72] and while the case was in equity, and the amendment therefore would seem not to have required a discussion of the subject at law, Mr. Chief Justice Tyson, in delivering the opinion, reviewed the opinions in Central of Georgia Ry. v. Foshee,

[70] 139 Ala. 578.
[71] See §§ 335, 345 ante.
[72] 152 Ala. 262.

and in Nelson v. First National Bank, and pointed out the apparent conflict between them, defining the limits of the right of amendments, as he saw them, in the language quoted above.[73]

Lastly in Alabama Consolidated Coal & Iron Co. v. Heald [74] the Supreme Court divided upon the plaintiff's right to amend a complaint for simple negligence by adding a count for wanton negligence after the statute of limitations had run, four of the justices holding with Mr. Justice Anderson that the new count referred to the original transaction, and three dissenting with Mr. Justice Dowdell, holding that a new cause of action was brought. The strength of the majority opinion is greatly increased by Mr. Justice Anderson's reference to the guide suggested above for chancery, the question whether a new case would be barred as a separate suit after the loss of the first. And the strength of the minority opinion is supported by the fact that the defendant is supposed to learn of the suit by the language of the complaint; and if the counts are entirely dissimilar he has no way to tell that they refer to the same transaction.

Happily the legislature has relieved the difficulty by enacting for amendments at law the rule supported by the majority,[75] and it was concluded above that the conflict had no necessary application to amendments in chancery. Let it be noted, however, that since this new enactment, the confusion from thinking the rules for amending in chancery and at law absolutely the same, will no longer survive.[76]

[73] See § 338, supra.

[74] 45 So. Rep. 686.

[75] Section 5367 Code of 1907.

[76] The author, and the bar generally, are greatly indebted to Professor Wm. S. Thorington, Dean of the Law School of the University of Alabama, and formerly a member of the Supreme Court of Alabama, for a very able article read before the Alabama State Bar Association at its meeting in July, 1908, in which the opinion of the minority of the Supreme Court in Ala. Consolidated Coal & Iron Co. v. Heald and the opinion in Nelson v. First Nat. Bank are supported. Judge Thorington's article will be found in the published minutes of the meeting of the Bar Association for 1908.

The importance of the article, as applicable to chancery pleading, lies probably in his suggestion that section 95 of the Constitution of 1901, (Art. IV § 56 of the Constitution of 1875) prohib-

§ 350. Matter of amendments made after taking of testimony.—There may be one limitation upon the right of amending the bill, even when the amendment does not make a departure or a new case. The Supreme Court has twice held that the right of amendment does not extend to enlarging the scope of the bill after the testimony has been published to make a basis for additional testimony. Those two decisions interpret the language of section 3126 of the Code authorizing amendments "to meet any state of evidence which will authorize relief," to mean "evidence already taken in the cause at the time of the proposed amendment."[77] The professed reason is to prevent repeated continuances; and it is pointed out that the statute entitles only the party against whom the amendment is allowed, to have the cause continued as a matter of right, although it provides that if the cause is continued both parties may take additional testimony. Those decisions make the purpose of the statute merely to correct errors of parties and to avoid variances between pleadings and proof. It may be doubted, however, whether those decisions are any longer law. The chancellor has the right to impose terms, as we shall see, upon which alone an amendment may be made; and if the testimony has to be retaken, the chancellor may require the cost of it to be paid as the condition of the amendment. So if the new matter does not make a departure, and a new case from that made by the bill, the amendment will probably be allowed, and a continuance granted the plaintiff for the taking of testimony to support it; for the statute nowhere forbids the chancellor to order a continuance if necessary to justice. It merely provides that if an amendment to the bill is allowed at the hearing the defendant may demand a continuance as of right, whether he desires to take testimony or not.

While no later decisions have disapproved the two above

ited the legislature from empowering a count to relate back so as to revive a right barred by lapse of time, and that the Supreme Court can do no more than the legislature can do to that end. From the standpoint of the defendant at law that might appear sometimes to be done, but in chancery the original transaction as we have seen will always show for itself.

[77] Beatty v. Brown, 85 Ala. 209; Smith v. Coleman, 59 Ala. 260.

cited, they were each only dicta on the point, since the records showed final decrees actually rendered in the causes, thus making the amendments illegal anyway. And it seems that in recent cases amendments have been made after publication of testimony, and additional testimony subsequently taken.[78]

§ 351. Amendment by change of parties.—So far no reference has been made to amending the bill by changing the parties as originally filed, the discussion assuming that no error was made in the original selection of the plaintiffs and the persons against whom the right is claimed. But the statute of amendments[79] authorizes amendments "by striking out or adding new parties;" and within the rule against making a departure or a new case, the statute is construed to authorize any change of parties short of an entire change of the parties to the original bill.[80] It is apparent, however, that sometimes a departure may be wrought by a change of parties without making any other change in the bill, especially where the change is in the parties plaintiff, and new parties are added as joint claimants or to avoid a multiplicity of suits. In the latter cases the joinder of causes is allowable under a principle of equity jurisdiction, however; and the determining factor would be shifted to the running of the statute of limitations against the claim added by the amendment.

This concludes the examination of amendments to the matter of bills. Let us now proceed to the time and mode of making amendments, and the procedure to be followed at the several times amendments may be made.

§ 352. Right to amend absolute: terms.—The statute of 1858, providing for amendments in chancery, removed all discretion on the part of the chancellor to allow them or not, provided they are offered before final decree.[81] His only dis-

[78] Ala. Terminal &c. Co. v. Hall, 152 Ala. 262, a second appeal in the same case as Henderson v. Hall, 134 Ala. 455.

[79] Sec. 3126, Code of 1907.

[80] Amendments adding new parties were allowed in Pitts v. Powledge, 56 Ala. 147, and in Collins v. Stix, 96 Ala. 338; and amendments adding new parties were disallowed in Scott v. Ware, 64 Ala. 174, and in Marshall v. Olds, 86 Ala. 296. Of course many other cases are to be found.

[81] Pitts v. Powledge, 56 Ala. 147; Gilmer v. Wallace, 75 Ala. 220; Ex parte Ashurst, 100 Ala. 573; Vanderford v. Stovall, 117

cretion is in the imposition of terms; which are limited by the statute to the total costs accrued up to the time of the amendment.[82] Usually, however, no costs are imposed by the chancellor, but if the application to amend the bill is made to the register, and is not made until after the filing of the answer, section 3127 of the Code of 1907 prohibits the register's allowing it except upon payment of the costs of the amendment.

§ 353. When application to amend necessary.—But while the right of amendment is absolute, it is held to be "a right which must be claimed by the party entitled to it, and the chancellor when there is an opportunity of claiming it, can be put in error only by a denial of it."[83] Therefore if a demurrer to a bill is sustained in term time, or if a petition is dismissed or stricken from the file in open court in term time for amendable defects, the court is under no duty to offer the right of amendment: the plaintiff or petitioner has opportunity to ask to amend, and may exercise it if he so desires.[84] The Supreme Court has recommended the practice in such cases not to dismiss the bill or petition without first allowing an opportunity to amend;[85] but the record need not show it, and on appeal in the absence of proof that the plaintiff had no such opportunity to amend the presumption will be indulged that he did not desire to do so.[86] The point cannot be raised first in the appellate court.[87]

Ala. 344. After final decree a motion to amend comes too late. Beatty v. Brown, 85 Ala. 209. But amendments within the lis pendens probably may be made after remandment by the Supreme Court, Park v. Lide, 90 Ala. 246.

[82] But the action of the chancellor in imposing terms is not subject to review on appeal. Mahone v. Williams, 39 Ala. 202.

[83] Per Brickell, C. J., in Bishop v. Wood, 59 Ala. 253, 258. But it is not error to have denied an amendment out of which no relief could have been obtained. Tutwiler v. Atkins, 106 Ala. 194. Nor does the mere filing of an amendment amount to moving for its allowance. It must be brought to the chancellor's attention. Beatty v. Brown, 85 Ala. 209.

[84] Security Loan Assn. v. Lake, 69 Ala. 456, at 466; Mahon v. Tatum, 69 Ala. 466; Buford v. Ward, 108 Ala. 307.

[85] Little v. Snedicor, 52 Ala. 167.

[86] Little v. Snedicor, 52 Ala. 167; Shackelford v. Bankhead, 72 Ala. 476, 480.

[87] Mahon v. Tatum, 69 Ala. 466.

Where, however, the demurrer is sustained in vacation, it is error to dismiss the bill without giving leave to amend; and the cause will be remanded that it may be done.[88] It is also held that a bill must not be dismissed in vacation for want of equity where the bill was a bill of review upon which a restraining order had suspended the execution of the decree reviewed, and the submission was upon the bill and the denials in an answer.[89] And by analogy it has twice been held that a bill should not be dismissed in vacation in a final decree upon pleadings and proofs if it appears to have equity but the proof shows a variance from the allegations of the bill, and the Supreme Court remanded the causes for the plaintiff to amend.[90] But in an earlier decision in such a case the supreme court held that the chancellor should have dismissed the bill without prejudice, and reversing the cause rendered such a decree.[91] Moreover an even later case held that in term time the chancellor could do no more than dismiss such a bill without prejudice.[92] So it is probable that dismissal without prejudice is the proper decree in vacation,[93] unless the new section 3212 of the Code of 1907 provides otherwise.

§ 354. The court cannot compel amendment.—But in every case the court can merely give opportunity to amend. It can recommend, but it cannot compel. "It remains with the party to amend or not as he may elect. It is beyond the power of the court, ex mero motu, to amend the pleadings, or eliminate any part thereof; nor can a decree on the merits have such effect."[94] The new section 3212 of the Code of 1907 provides

[88] Kingsbury v. Milner, 69 Ala. 502; Shackelford v. Bankhead, 72 Ala. 476; Staudenmire v. DeBardeleben, 72 Ala. 300; Connor v. Smith, 74 Ala. 115.

[89] Bishop v. Wood, 59 Ala. 253.

[90] Gilmer v. Wallace, 75 Ala. 220; Olds v. Marshall, 93 Ala. 138. Application to amend in such case must be made on the second day of the next term, however. Chancery Rule 47, Code of 1907.

[91] Munchus v. Harris, 69 Ala. 506.

[92] Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178.

[93] See language of Coleman, J., in Wilkinson v. Buster, 115 Ala. 578. But compare Chancery Rule 47 apparently recognizing the right to amend.

[94] Per Clopton, J., in Caldwell v. King, 76 Ala. 149.

that "on the submission of any cause for final decree the chancellor * * * may if justice require it, set aside the submission for the purpose of amendment, or taking further testimony," but this will hardly be construed to give him right to direct an amendment if the parties do not desire it.[95]

§ 355. Amending by Interlineation.—The form of amendments depends primarily upon their extent. If the amendment is brief, and its matter is capable of being inserted in the bill by interlineation or erasure, the amending may be done by that method, apparently without regard to the stage of the cause at which it is made. But ink of a different color must be used from that used in the body of the bill; and the amendment shall be made in such manner as to distinguish it.[96] Moreover in case of such amendments a new foot-note is not necessary; and oath to the answer to such new matter is waived if the original footnote contained a waiver.[97] And on appeal from a decree overruling a demurrer for want of a new footnote to the bill after amendment, the Supreme Court will presume that the amendment was by interlineation, and the new footnote unnecessary.[98] Apparently if the amendment is one which can be interlined, it is not necessary to have a new footnote, even if the new matter is filed as a separate paper.[99]

§ 356. Lengthy amendments.—Every amendment too long to be appropriately interlined must be upon separate sheets of paper from the bill.[1] and filed with the register as an amendment. If it is in one paragraph or section, and as a whole substitutes or is added to an already numbered section in the original bill, no new footnote is necessary.[2] But if it

[95] Heretofore a submission could be set aside to allow an amendment, but apparently only on motion and notice to the adverse party, who was entitled to be heard upon the matter of costs. Wilkinson v. Buster, 115 Ala. 578.

[96] Chancery Rule 39, Code of 1907; Werborn v. Austin, 82 Ala. 498.

[97] Ladd v. Smith, 107 Ala. 506; Werborn v. Austin, 82 Ala. 498; Frey v. Fenn, 126 Ala. 291.

[98] Prestwood v. Troy Fertilizer Co., 115 Ala. 668.

[99] Frey v. Fenn, 126 Ala. 291.

[1] Chancery Rule 39, Code of 1907.

[2] Ala. Warehouse Co. v. Jones, 62 Ala. 550.

consists of long or varied matter it should be divided up into sections, and the defendant should be required by a new footnote to answer the bill as amended; for he has the right to know what matter he is expected to answer.[3] But apparently an answer under oath cannot be required to the amendment after having been waived in the original bill, if the bill does not become thereby a bill for discovery.[4]

§ 357. Effect of amendments.—We have already seen that a bill amended by the insertion of new matter is regarded as one complete bill, and that the amendment, if of facts which had occurred prior to the filing of the original bill, relates back to the time of filing suit.[5] Therefore after amendment a demurrer is to the bill as amended, and not to the amendment.[6] If an answer had been filed before the bill was amended, however, a new section of the Code provides that all new defensive pleadings shall be allowed as amendments to defensive pleadings already in the cause,[7] although what that section involves it is difficult now to foresee.

This conclusion, that an amendment when of matter antedating the filing of the original bill, relates back to that time, seems to be forbidden by Chancery Rule 43, Code of 1907, which provides that "When an amendment to a bill is allowed, it shall be considered as introduced into the bill from the time of its allowance." But that rule has been in the last four Codes, and the doctrine of relation has been repeatedly affirmed in the meanwhile without regard to any construction of the rule to the contrary.[8] The doctrine of relation has not been always accurately stated, however.

In Adams v. Phillips,[9] Chief Justice Brickell said that, "So far as the equity of the bill is involved, the amended bill has relation to the commencement of suit by the filing of the original bill," and while this somewhat restricts the relation, it seems to give all necessary remedial effect to the amend-

[3] Ladd v. Smith, 107 Ala. 506.
[4] McCaw v. Barker, 115 Ala. 543.
[5] See § 339 supra.
[6] Hodges v. Verner, 100 Ala. 612.
[7] Sec. 3128, Code of 1907.
[8] Adams v. Phillips, 75 Ala. 461; Jones v. McPhillips, 82 Ala. 102, 112; Ala. Terminal &c. Co. v. Hall, 152 Ala. 262.
[9] 75 Ala. 461.

ment. Rule 43 must mean therefore that for the purpose of determining the effect of the amendment upon the time of pleading, account shall be taken only of the date of its allowance.[10] Therefore publication, the taking of testimony, decrees pro confesso, and other incidents of the cause accomplished before its allowance will not be considered applicable to the amendment; but the time of occurrence of matters alleged in the amendment speak for themselves.

§ 358. Amendments setting up subsequent facts. — Nor does this construction of chancery Rule 43 effect the practice of introducing subsequent facts by way of amendment instead of by a supplemental bill.[11] If the new facts subsequently occurring affect the equity of the original bill they should be allowed to do so; but of course they will not relate back in their time of occurrence and become a part of the original transaction. A bad cause of action cannot be made a good cause of action by facts subsequently occurring.[12] The doctrine of relation cannot support an absurdity; facts cannot be presumed to have existed when they could not have existed.[13] The practice allowing amendments setting up subsequent facts, is merely to avoid supplemental bills; and so the subsequent facts must merely support the earlier facts, not make a new case.[14] And for the same reason persons who have voluntarily acquired interests in the subject matter of the cause since its pending, cannot be brought in by amendment, such additions being limited to those who acquire by operation of law.[15]

§ 359. Amendments bringing forward matter in reply.— Again a construction of Rule 43 not destroying the doctrine

[10] If a different meaning is involved in the opinion in Rogers v. Haines, 103 Ala. 198, it must be regarded as dictum, for the amendment in that case involved facts which occurred after the filing of the bill.

[11] Chancery Rule 45, Code of 1907; Freeman v. Brown, 96 Ala. 301; Ala. Warehouse Co. v. Jones, 62 Ala. 550.

[12] Rogers v. Haines, 103 Ala. 198.

[13] Jones v. McPhillips, 82 Ala. 102, 112.

[14] Planters' & Merchants' Mut. Ins. Co. v. Selma Savings Bank, 63 Ala. 585.

[15] Morton & Bliss v. N. O. & S. Ry. Co., 79 Ala. 590. But an amendment may take the place of a bill of revivor against the personal representative or the

of relation is necessary to sustain the practice recognized by section 3126 of amending "to meet any state of evidence which will authorize relief;" that is to say, bringing in new matter in avoidance of defenses set up in a plea or in the answer.[16] Of course such matter, if it consists of facts transpiring prior to the filing of the bill, should relate back and become part of the original cause.

§ 360. Amendments allowed before demurrer may be filed later.—But the strongest reason for construing chancery Rule 43 as providing that an amendment is part of the bill from the time of its allowance merely so far as the time of pleading and taking orders is concerned, lies in the necessary meaning of Rule 42, which has immediately preceded Rule 43 ever since the first Code in which they both appeared, "In all cases where the original bill has been answered no order can be obtained to amend the bill generally, but the amendments must be prepared and proposed" as directed in an earlier rule. We have found the practice recommended by the Supreme Court of always offering the opportunity to amend after sustaining a demurrer, even when done in open court, and we have seen that in decrees rendered in vacation it is error not to reserve to the parties the opportunity to amend where necessary to justice.[17] In both these cases the amendments cannot be filed until a later time. But in addition to these instances Rule 42 recognizes the practice convenient in districts where the court sits for a short time only, of obtaining leave to amend, in term time and filing the amendment later, providing, when taken in connection with Rule 41, and section 3125 of the Code that although such general leave to amend may be had up to the time demurrers are filed, it cannot be obtained later than that period. Therefore Rule 43 means that such amendments, whether filed in pur-

heirs of a deceased party, although it is not the regular mode. Wells v. American Mtge Co., 109 Ala. 430; Floyd v. Ritter, 65 Ala. 501. Compare Chancery Rule 102, Code of 1907.

[16] Smith v. Vaughan, 78 Ala. 201; Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178. Matter merely traversing the defenses need not be introduced into the bill, however, that going merely to contradict the defendant's case. Lanier v. Hill, 30 Ala. 111.

[17] See § 352, ante.

suance of leave reserved by the court, or in pursuance of leave granted upon application, shall be considered as introduced into the bill from the time of the order allowing them, and not from their actual filing. In no case, however, will an amendment be presumed upon appeal to have been actually made from the sole fact that leave to amend was obtained.[18]

§ 361. All other amendments filed at once.—In all cases where leave to amend is sought after a demurrer and the argument thereof, or after the answer has been filed, the order to amend is granted only on motion after prescribed notice to the opposite parties of the time when the application will be made; and the opposite parties must also be served with a copy of the proposed amendment.[19] Thus a particularly described amendment is allowed, although it is usually identified in the order merely as an amendment on separate paper, or by interlineation, as the case may be, "this day filed."

§ 362. Notice of application to amend.—Before the defendants have been served with process the bill can be amended without notice of the application, and the summons also can be amended if the amendment affects the process.[20] And apparently after the defendant has been served, the bill may be amended without notice of the application, if the defendant has not obtained a certified copy of the bill. But if the defendant has been served, and has obtained a copy of the bill, the bill may be amended without notice of the application, but the plaintiff must pay the costs of furnishing the defendant a copy of the amendment. And the same provisions apply to amendments made after a demurrer but before the argument.[21] But to obtain leave to amend after hearing upon a demurrer, or after the filing of a plea or answer, notice of the time when application will be made must be given the defendant, together with a copy of the motion, unless the defendant is in default for want of an answer, when notice for the proper time may be given upon an order book, a book provided by the register for the entry of such notices.[22] The

[18] Keith v. Cliatt, 59 Ala. 408, a decision at law.

[19] Chancery Rule 40, Code of 1907.

[20] Sec. 3124, Code of 1907.

[21] Sec. 3125, Code of 1907.

[22] Sec. 3133, Code of 1907.

length of notice provided where the application is made to the chancellor in term time is but one day, but when made to the chancellor in vacation it is ten days; and unless proper notice is given or waived the chancellor should refuse to allow the amendment.[23] When application is made at the hearing in open court, no notice is necessary, but the chancellor may postpone hearing the motion as justice may require.[24] If the application be made to the register after answer has been filed, he may grant it only upon five days notice, unless waived.[25]

§ 363. Notice of allowance of amendments.—An amendment allowed before service of summons requires no notice to the defendant to become perfected.[26] But after service has been perfected upon a defendant he is entitled to actual notice by service of the allowance of amendments to the bill, unless he is a non-resident; and in that case the court shall direct in what manner he shall be notified.[27] If he has obtained a certified copy of the bill, he is entitled to a certified copy of the amendment, for which the plaintiff must pay.[28]

But if the defendant was actually present in open court at the allowance of the amendment, either in person or by solicitor or guardian ad litem, he is presumed to have notice of it.[29]

A defendant in default for want of an answer, or against whom a decree pro confesso has been taken, shall be deemed to have notice of the allowance of an amendment when notice has been entered upon the order book for such time as the chancellor or register may direct.[30] But apparently some entry must be directed; for notwithstanding the decree pro confesso, the defendant is entitled to notice of the amendment.[31] Notice of some sort seems to be necessary to perfect every amendment of which notice is required; and without

[23] Chancery Rule 40, Code of 1907; Hinton v. Citizens Mut. Ins. Co. 63 Ala. 488.

[24] Chancery Rule 40, Code of 1907.

[25] Sec. 3127, Code of 1907; Chancery Rule 40.

[26] Sec. 3124, Code of 1907.

[27] Chancery Rule 44, Code of 1907.

[28] Sec. 3125, Code of 1907.

[29] Chancery Rule 44, Code of 1907; Gayle v. Johnston, 80 Ala. 395.

[30] Chancery Rule 44, paragraph 3, Code of 1907.

[31] McClenny v. Ward, 80 Ala. 243; Holly v. Bass, 63 Ala. 387.

it the case will be reversed on appeal even though the chancellor and counsel failed to note the omission at the hearing.[32] But if no relief rested upon the amendment the omission of notice will not vitiate the decree.[33] And if the record recites that notice was given, irregularity in it will not be presumed.[34]

[32] Alston v. Alston, 34 Ala. 15, 23.

[33] Masterson v. Masterson, 32 Ala. 437; Howton v. Jordon, 46 So. Rep. 234.

[34] Berney Nat. Bank v. Guyon, 111 Ala. 491, 505.

CHAPTER XII.

Decrees pro Confesso and Final Decrees Thereon.

§ 364. Definition: when obtainable.—A decree pro confesso under Alabama chancery practice is an order in a cause that the defendant against whom the decree is taken shall be considered as admitting the truth of the allegations upon which rest the equity of the bill.[1] It may be obtained upon motion as soon as the time has expired within which the defendant should have appeared and pleaded to the bill. This time in Alabama is "thirty days after service of the summons, or thirty days after the period specified in the order of publication, if the publication required by the order has been perfected, unless the time for answering or pleading has been extended."[2] If the time for pleading has been extended by order of court; a decree pro confesso is obtainable at the end of the period of extension.[3]

§ 365. Decree pro confesso upon amendments.—And for the purpose of taking decrees pro confesso, the original bill and its amendments stand separate.[4] Apparently even the allowance of an amendment to the bill before the defendant has filed any pleading, does not extend the time for pleading to the bill as amended to thirty days from the time of notice of allowance of the amendment. So if the amendment is allowed too late for a complete answer to be prepared before the expiration of thirty days from the original service, the defendant should obtain an order extending the time for filing an answer to the bill as amended, lest a decree pro confesso be taken upon the original bill, although time be not over for pleading to the amendment. This seems to be a corollary from a part of Chancery Rule 46, which provides that "an amendment to a bill, or the filing of an amended bill, shall not set aside a decree pro confesso as to any defendant, to the original or any other bill," and from Chancery Rule 48, which provides that

[1] Sec. 3163, Code of 1907.
[2] Sec. 3162, Code of 1907.
[3] Sec. 3107, 3162, Code of 1907.
[4] Chancery Rule 48, Code of 1907.

a decree pro confesso may be entered upon the amendment against the defendant who fails to plead to it within thirty days after notice thereof, unless the matter of the amendment has already been denied by him in a previous answer.

But the converse of these propositions is also law. If the bill has been answered as it stood before the allowance of the amendment, a decree pro confesso upon the amendment will not operate as a confession of the bill and any prior amendments already answered.[5]

§ 366. Against whom decrees pro confesso may be taken.— Since the essence of a decree pro confesso is an assumed admission, it can be rendered against those alone who are legally capable of confessing. It cannot be taken against infants; nor persons of unsound mind; nor against executors and administrators,[6] whose admission of averments may be a breach of legal duty.[7] The principle of this limitation was expressed in the early section in Clay's Digest from which the section in the present Code has come down;[8] "the chancellor shall give

[5] Chancery Rule 46, Code of 1907. All this is contrary to English practice. In England when a bill was amended after full answer, unless the bill as amended was answered, a decree pro confesso could be taken upon the bill generally. "And when an order was made for the clerk in court to attend with the record of the bill, in order to have it taken pro confesso, as to the amendments only, Lord Apsley discharged the order, being of opinion that the original and amended bills were one record, and that the amendments not being answered, the record was not answered." 1 Daniell Ch. Pr. 575.

[6] Sec. 3163, Code of 1907.

[7] "No claim against the estate of a decedent, whether in favor of the personal representative or any other person, which was barred by the statute of limitations at the time of the death of such decedent, shall be paid by or allowed to the personal representative, unless the payment of such claim be expressly directed by a testator in his will." Sec. 2599, Code of 1907. That section was new in the Code of 1896, but the principle was old as to the liability of real estate of the decedent. McDonald v. Carnes, 90 Ala. 147; Pollard v. Scears, 28 Ala. 484. Strangely enough the statutes did not forbid decrees pro confesso against trustees; and there seem to be no Alabama decisions. Compare section 143, supra. It is held, however, that a decree pro confesso against a cestui que trust dispenses with proof against his trustee. Johnson v. Longmire, 39 Ala. 143; Hartley v. Bloodgood, 16 Ala. 233.

[8] Clays Ala. Dig. 354 § 5. Act of 1841.

the same order or decree" upon the bill "as if answer had been filed confessing the same."

§ 367. Decrees pro confesso in divorce cases.—In addition to bills against infant and insane defendants, the section in Clay's Digest above quoted excepted from among the bills the allegations of which should be "admitted" by failure to answer after service, bills for divorce. And but for the fact that even earlier laws provided for decrees pro confesso in all cases[9] it would seem that no decrees pro confesso could be taken in suits for divorce, just as no decrees pro confesso can be taken against infants.[10]

The point seems not to have been passed upon in the Supreme Court of Alabama, although the same exception coupling cases for divorce with cases against infants has come down to the present.[11] But it has been finally decided by statute, and is made a new section of the Code of 1907;[12] so that it is now clearly proper to take a decree pro confesso in divorce cases when the defendant is summoned but does not plead. The decree pro confesso does not serve for an admission of the allegations of the bill, however, as in other cases; for the plaintiff must still prove a right to the divorce by appropriate testimony.[13] And this anomaly requires our examining the history of decrees pro confesso.

§ 368. History in English practice.—Some attention has already been given to the history of decrees pro confesso, and it was pointed out that the difference between the effect of these decrees as originally applied in England and as applied

[9] Act of 1823, given in Aiken's Digest, 287, applicable to defendants served with process, and Act of 1805, Clay's Digest 352 §§ 44-49.

[10] Dailey v. Reed, 74 Ala. 415.

[11] Sec. 3163, Code of 1907.

[12] Sec. 3164, Code of 1907.

[13] ibid. The purpose of the new section 3164, is to authorize the plaintiff in divorce cases, when no defense has been interposed and his evidence has been taken after a decree pro confesso, to file a written request with the register or clerk of the court in which the cause is pending to deliver the file to the chancellor for final decree at once, whether in term time or vacation, and to render such a decree as binding as if rendered in term time. The section in thus reciting the method of obtaining the decree refers to the taking of the decree pro confesso; and so authorizes the practice.

in Alabama, constituted one of the four fundamental differences between Alabama chancery practice and the English practice from which ours is derived.[14] Decrees pro confesso were not very old in England, that is, they did not originate in the beginning of chancery procedure.[15] If the defendant after service of process and appearance, failed to answer, he could be attached and imprisoned, or if he could not be found, his property could be sequestered; all of which placed the defendant in contempt and was directed to compelling him to make answer.[16] But if the defendant still refused to answer, the court of chancery was powerless to render the plaintiff the justice to which his bill on its face showed him entitled until an ex parte method of procedure was devised. The defendant's allowing himself to be put in contempt, which was determined by the sealing of the writ directed to enforcing obedience to the court's summons, precluded him generally, until his contempt should be properly effaced, from making a defense in the cause. And in this situation the early practice seems to have been, to make a preliminary order for the bill to be taken as confessed, and all defenses being thereby eliminated, to require the plaintiff at a subsequent hearing to establish the truth of the material allegations in his bill.[17] But in modern times this requirement was dispensed with, first where the defendant was in custody; when his refusal to answer might well be taken for a confession of the truth of the plaintiff's tale; and the plaintiff was then allowed to draw up such a decree as he desired.[18] But later a decree pro confesso was granted, and all proof by the plaintiff of the equity of the bill was dispensed with in every case where the defendant had failed to reply, whether after arrest following personal service, or after service without any arrest, or even where the defendant absconded without having been served

[14] Secs. 6–12 supra; and compare the discussion in Appendix C. post.

[15] 1 Daniell Ch. Pr. 569. Mr. Justice Story does not discuss decrees pro confesso in his book upon equity pleading.

[16] 1 Daniell Ch. Pr. 537 et seq.

[17] The older practice to this effect is referred to in Johnson v. Desmineere, 1 Vernon, 223, as having obtained prior to that time (1683). Compare Rose v. Woodruff, 4 Johnson, Ch. 547.

[18] 1 Daniell Ch. Pr. 569.

at all, the rules of 1845 providing for an appearance to be entered for the defendant upon motion by the plaintiff.[19]

Let it be remembered, however, that notwithstanding the decree pro confesso, the defendant remained in contempt. He could appear at the hearing, and after consenting to the decree pro confesso, contest the prayer of the plaintiff on the case made by the bill; but he could not have the decree set aside and answer the bill except upon complying with such terms as the court thought right to impose.[20] And even to the end of the days of English chancery pleading, the decree pro confesso did not admit all the allegations of the bill; it amounted to an admission of the facts constituting the equity only. The details of relief, such as the amount of money sued for, or the balance of account, had always to be verified, usually on a reference to a master.[21]

[19] 1 Daniell Ch. Pr. Chapter X.

[20] 1 Daniell Ch. Pr. 579 et seq.

[21] Langdell Eq. Pl. § 84. The history of decrees pro confesso in England from the early practice of entering the decree only after the defendant had been taken into custody and had been brought into court three times, and had heard the bill read over to him, down to the modern practice of entering the decree upon the defendant's default alone, will be found carefully set forth in a report by Master Hoffman in the case of Williams v. Corwin, Hopkins Chancery Reports (N. Y.) 471, and also in an opinion by Bradley, J., in the case of Thomson v. Wooster, 114 U. S. 104, 110, each citing the early authorities. The text of both these citations may be found in footnotes to Van Zile on Chancery Pleading and Practice 115, 116.

In Johnson v. Desmineere, 1 Vernon 223, the attorney-general said that the reason on which the decree pro confesso was founded was that the defendant by default prevented the joining of issue and the proof of the case. And the court said that undoubtedly after the decree the plaintiff was required to prove his case exparte.

And the solicitor-general added that this practice was abandoned because the plaintiff's case rested so frequently upon discovery from the defendant himself. Under modern practice the extent of the confession authorized by the decree depended of course upon the accuracy of the allegations of the bill. Hoffman's conclusion was: "That whenever the allegations of a bill are of a nature so distinct and positive that, taking them to be true, the court can make a decree upon them, it will, upon the order pro confesso, decree without proof. Where they are in their nature so defective or vague that a precise decree cannot be made upon them, proof

§ 369. History in Alabama.—No Alabama decision upon decrees pro confesso appears in the reports prior to the passage of the Act of 1823,[22] which provided that when a defendant who had been served with process failed to answer within thirty days, the bill should be taken pro confesso, but that "before a decree is pronounced on a bill taken pro confesso, the court shall be satisfied, by sufficient evidence, of the justice of the complainant's claim or demand." Prior to 1823 it is probable that the then modern English practice was accepted allowing a decree pro confesso after service whenever the party was "in wilful contempt, without proceeding to the last process of sequestration," and following the decree pro confesso with a final decree without proof.

The Act of 1823 was said to introduce a new practice, and "to have been intended to abrogate the old rule which authorized a decree on the allegations of the bill merely and without any evidence."[23] But the proof required by the act was construed not to be the same required when a cause was at issue between the parties.[24]

This practice under the Act of 1823, requiring proof of the bill after a decree pro confesso, obtained in Alabama until the Act of 1841 in all cases where the defendant was served with process. Where the defendant was a non-resident, however, or where he had absconded and was not served with process, the Act of 1823 was held not to apply. An act passed in 1805 by the territorial legislature, provided for proceeding against non-resident and absconding defendants, and authorized a decree pro confesso after perfection of service by publication. This Act of 1805 required no proof, and the Act of 1823 was construed not to repeal it. So by force of statute no proof of the bill was held to be necessary after a decree pro confesso against defendants who were brought into court by publication.[25]

The Act of 1841[26] did not affect the practice in cases

must be adduced, from the necessity of the case."

[22] Aiken's Digest 287.

[23] Levert v. Redwood, 9 Porter, 79, 92.

[24] Wilkins v. Wilkins, 4 Porter, 245; Arnold v. Sheppard, 6 Ala. 299.

[25] Arnold v. Sheppard, 6 Ala. 299; Wellborn v. Tiller, 10 Ala. 305; Butler v. Butler, 11 Ala. 668.

[26] Clay's Digest 354, § 58.

against non-resident or absconding defendants, but made the practice against resident defendants conform to it, "except in cases of infant defendants, femes coverts, idiots or lunatics, and cases of divorce."[27] But it most be noted that the dispensing with proof of the bill was accomplished by statute, both against residents and non-residents, and therefore was more complete than if done by judicial variation of the practice. The Act of 1805 provided that on due proof of publication the court might "order the plaintiff's bill to be taken pro confesso, and make decree thereon, and carry such decree into full effect as in other cases;" and the Act of 1841 provided that the chancellor should give the same decree on the bill "as if answer had been filed confessing the same."

Both the Act of 1805 and the Act of 1841 were combined in the Code of 1852;[28] and it was provided that "in all cases in which decrees pro confesso are lawfully taken, the allegations of the bill are to be regarded as admitted, except in case of infant defendants, lunatics, executors and administrators, and bills for divorce." This language has remained the wording of the statute down to to-day;[29] so that after a decree pro confesso it would seem unnecessary to offer evidence in Alabama in any case against a defendant outside the above exceptions, in proof of any matter clearly alleged in the bill.

§ 370. Effect of decree pro confesso in Alabama.—The decisions of the Supreme Court of Alabama have reiterated the conclusion that a decree pro confesso amounts to a clear admission of the allegations of the bill.[30] It is even conclusive of the same allegations between the same parties or their privies in a later suit.[31] But it is an admission only of

[27] Carradine v. O'Connor, 21 Ala. 573; Butler v. Butler, 11 Ala. 668; Wellborn v. Tiller, 10 Ala. 306.

[28] Secs. 2938, 2939, Code of 1852.

[29] Sec. 3163, Code of 1907. The recent Codes substitute "persons of unsound mind" for "lunatics."

[30] Baker v. Young, 90 Ala. 426; Mobile Savings Bank v. McDonnell, 87 Ala. 736, 750; Thornton v. Neal, 49 Ala. 590.

[31] A. G. S. Ry. v. S. & N. A. R. R. Co., 84 Ala. 570. But if the bill is dismissed before final decree upon the decree pro confesso, the record is not conclusive evidence of the allegations of the bill when offered in another cause. Garrett v. Ricketts, 9 Ala. 529.

facts well pleaded, not of mere conclusions. It cannot aid or supplement defective averments.[32] Its effect will appear from the following language of Justice Stone: "Bills in chancery must set forth, not the evidence, but every material averment of fact necessary to complainant's right of recovery. So complete must be the averments of fact that on demurrer or decree pro confesso the court can without evidence be able to perceive and affirm that complainant is entitled to the relief prayed." But a decree pro confesso does not admit that the plaintiff is entitled to the relief prayed: it does not admit the equity of the bill.[33]

§ 371. To what extent defendant is in contempt.—It must also be noted that statutes and decisions have materially modified the effect of failure to answer after service and decree pro confesso in the matter of contempt. It is true that a defendant in such a situation is still said to be in contempt;[34] and it still remains law "that a defendant who is in contempt will not be allowed to contradict the allegations of plaintiff's bill, bring forward any defense, or allege any new facts," as was laid down in Mussina v. Bartlett,[35] until the decree pro confesso has been set aside. And no copy of interrogatories need be given him, nor need the interrogatories lie ten days in the register's office, as in other cases.[36] Nor need he be given notice by the register of the taking of an account.[37] But the holding of the early decisions that he cannot appear before the master and contest the plaintiff's account,[38] has been reversed by statute, and "a defendant against whom a decree

[32] Johnson v. Kelley, 80 Ala. 135; McDonald v. Mobile Life Ins. Co., 56 Ala. 468.

[33] Johnson v. Kelley, 80 Ala. 135; Nat. Bldg. & Loan Assn. v. Ballard, 126 Ala. 155; Johnson v. Hataway, 46 So. Rep. 760.

[34] Chancery Rule 33, Code of 1907; Madden v. Floyd, 69 Ala. 221.

[35] 8 Porter 277; Madden v. Floyd, 69 Ala. 221; § 3167, Code of 1907.

[36] Chancery Rule 61, Code of 1907; Atkisson v. Atkisson, 17 Ala. 256.

[37] Chancery Rule 91, Code of 1907. But compare § 3158, Code of 1907 requiring notice of references to be given all parties, and the decision in Mobile Savings Bank v. McDonnell, 87 Ala. 736, that defendants do not cease to be parties by the entry of decrees pro confesso against them.

[38] Mussina v. Bartlett, 8 Porter 277; Levert v. Redwood, 9 Porter 79; Butler v. Butler, 11 Ala. 668.

pro confesso is taken * * * may appear before the register on a reference."[39]

The English practice by which the defendant was allowed to appear at the hearing and contest a decree on the merits of the bill was early made law in Alabama by statute,[40] and our Supreme Court soon recognized that this right involved the right to move to dismiss the plaintiff's bill for want of equity upon its face; and construed that the statutory motion to dismiss for want of equity, now abolished by the Code of 1907, could be made by the defendant, notwithstanding the decree pro confesso, at any stage of the cause.[41] Moreover it was early held that such a defendant might assign error in the proceedings on a reference at which under the law at the time he had not the right to appear, if the report of the reference showed error upon its face.[42] So the final decision of Mobile Savings Bank v. McDonnell,[43] that the decree pro confesso does not operate to discharge a defendant from being a party to the record nor "sever his connection with the cause," that "he is still invested with the authority to show himself an active and troublesome litigant," although in a "limited filed of operation," leaves the quantum of his contempt a matter of extreme doubt.

No later decision seems to have referred to the defendant as in contempt. And while many of the early consequences of contempt as dispensing with notice are still recognized in the Rules of Practice of to-day,[44] many others have been modified by statute or dispensed with.[45] And section 3133 of the Code which provides that "when parties are in default

[39] Sec. 3166, Code of 1907.

[40] See § 368, supra. § 3166, Code of 1907.

[41] Smith v. Robinson, 11 Ala. 840; Thornton v. Neal, 49 Ala. 590; Madden v. Floyd, 69 Ala. 221.

[42] Levert v. Redwood, 9 Porter 79.

[43] Mobile Savings Bank v. McDonnell, 87 Ala. 736 at 750.

[44] See Chancery Rules 33, 61, 91, Code of 1907. The word "contempt" is used in Rule 33 only, "A defendant who has excepted to a bill for scandal or impertinence, shall not be placed in contempt for want of an answer, until a decision on the exceptions."

[45] Chancery Rule 40, Code of 1907. Notice of the allowance of an amendment after a decree pro confesso must be entered upon the order book. Chancery Rule 44, Code of 1907. Compare § 363, supra.

for want of an answer, or other cause, the notices may be entered on the order book of the register, and such entries, for such time as is fixed by the register, are sufficient in cases of amendments, supplemental bills, and of other orders in the cause," is enough in conflict with the rules of practice dispensing with notice to make it the safer practice to give notice upon the order book of every proceeding.

But the strongest ground for holding that the defendant's contempt is abolished is that by Chancery Rules 46 and 48 amendments to bills and original bills are made to stand separate and apart; so that apparently a defendant has the right to answer an amendment to a bill although a decree stands uncancelled that the original bill is confessed.[46]

§ 372. Right to make motions after decree pro confesso.—In the present condition of the decisions and statutes therefore, whether a defendant who has suffered a decree pro confesso after service to be taken against him, will be allowed to make any ordinary motions or file any petitions in the cause, or whether he must first have the decree pro confesso set aside and make full answer to the bill, it is difficult to decide. If he is in contempt of course he must pursue the latter course. But certain it is that he cannot under the form of a motion attempt to present a defense. He cannot move to dismiss the bill for want of parties.[47]

§ 373. When decree pro confesso may be taken.—Section 3162 of the Code of 1907 provides that "Decrees pro confesso may be taken before the register on the failure of the defendant to demur, plead to, or answer the bill within thirty days after service of the summons, or thirty days after the period specified in the order of publication, if the publication required by the order has been perfected, unless the time for answering or pleading has been extended; in which case, a decree pro confesso may be passed at the expiration of such time." The common practice is to take decrees pro confesso before the register, as he can enter them in vacation. Section 3107,

[46] Compare Masterson v. Masterson, 32 Ala. 437; Berney Nat. Bank v. Guyon, 111 Ala. 491, 505.

[47] Thornton v. Neal, 49 Ala. 590. Compare the motions in Bank of St. Mary's v. St. John, 25 Ala. 566, and in Jones v. Beverly, 45 Ala. 161.

authorizes the chancellor also to enter them under the same circumstances as those set forth for the register's entering them; but the chancellor probably cannot enter them except in term time. In no event can a valid decree pro confesso be entered before thirty days after service of process or perfection of publication.[48] The record must show the decree pro confesso properly rendered; and "recitals in a final decree that the decree pro confesso has been taken, or separately of facts which would authorize its rendition, cannot supply its absence."[49] And if the decree pro confesso is upon an amendment, the record must show proper notice of the amendment.[50]

§ 374. What decree pro confesso must recite.—As to the form of the decree pro confesso, it is not enough that the decree recite merely that the bill is taken as confessed against the defendants in default: whether it be taken for default of answer after service, or on perfection of publication, it "ought to state the facts upon which it is founded and declare the sentence of the court upon the facts, that the bill is to be taken as confessed."[51] Nor is it sufficient when it recites "that publication has been made and perfected agreeably to the rules of practice in this court, without stating the facts necessary to constitute good service."[52] So if the defendant is a corporation, the decree should recite the making of proof to the court that the person served with process for the defendant was in fact the officer or agent of the corporation as alleged.[53]

§ 375. Irregularities may be waived.—But while irregularities in service or publication as a basis for the decree pro confesso will render the entering of the decree error,[54] these irregularities must be objected to in the lower court, otherwise any appearance or motion which the defendant is cap-

[48] Levert v. Redwood, 9 Porter 79; Pittfield v. Gazzam, 2 Ala. 325; Madden v. Floyd, 69 Ala. 221.

[49] Chilton v. Ala. Gold Life Ins. Co., 74 Ala. 290, involving a decree against a non-resident upon publication. One acting for the register cannot enter a decree pro confesso. Meadows v. Edwards, 46 Ala. 354.

[50] So. Bldg. & Loan Assn. v. Riddle, 129 Ala. 563.

[51] McDonald v. McMahon, 66 Ala. 115.

[52] Keiffer v. Barney, 31 Ala. 192.

[53] Oxanna Bldg. Assn. v. Agee, 99 Ala. 591.

[54] Hurter v. Robbins, 21 Ala. 585.

able of making while a decree pro confesso stands against him will be taken as a waiver of the irregularities in it.[55]

§ 376. When decree pro confesso set aside.—Before a defense to the bill can be presented by a defendant a decree pro confesso standing against him must be set aside by an order of court shown by the record. The mere filing of an answer does not of itself set aside the decree pro confesso.[56] The Code provides that a defendant may have a decree pro confesso standing against him set aside on application to either the chancellor or the register at any time before publication of the testimony. He must file "a full and sufficient answer," however, at the time the decree pro confesso is set aside; and he must pay such costs as may be imposed, not extending beyond the time of making application if the decree was rendered upon publication, but, full costs, if imposed when he has been served with process.[57] And in the latter case he must also make a proper showing why he did not plead before.

It will be noted that the defendant must file a full and sufficient answer; which apparently is determined by the chancellor; but a prior refusal to allow an insufficient answer to be filed does not preclude the defendant from later offering a sufficient one.[58] Subject to the conditions named, up to the time indicated by the statutes the setting aside the decree pro confesso and filing an answer is a matter of right; and even after the cause has been appealed upon the validity of the decree pro confesso and remanded with instructions for a particular course, the chancellor may set aside the decree under the statutes.[59] But after the "publication of the testimony," or apparently after the submission of the cause at final hearing in suits requiring no testimony after decree pro confesso, the setting aside of a decree pro confesso and leave to file an answer are left to the sound discretion of the chancellor.[60]

[55] Bank of St. Mary's v. St. John, 25 Ala. 566, 616; Jones v. Beverly, 45 Ala. 161.

[56] Pickering v. Townsend, 118 Ala. 351. This settles the query in Davenport v. Bartlett, 9 Ala. 179.

[57] Sections 3167, 3168, Code of 1907.

[58] Pond v. Lockwood, 11 Ala. 567.

[59] Keenan v. Strange, 12 Ala. 290.

[60] Sec. 3169, Code of 1907; Jordon v. Jordon, 17 Ala. 466; Hurter v. Robbins, 21 Ala. 585.

It has been held too late after final hearing and the statement and report upon an account, unless by consent of parties.[61] Formerly a decree pro confesso after personal service would not be set aside to allow the filing of a demurrer or a plea;[62] but now "a defendant may also plead or demur upon such terms as the chancellor may order."[63]

§ 377. Decree pro confesso necessary.—A decree pro confesso takes the place of a joinder of issue between the parties; and while it is taken in our practice as a full admission of all matters well pleaded in the bill, as well as the exhibits,[64] and is even equivalent to a waiver of the right to set up such defenses as the statute of frauds, [65] the mere right to a decree pro confesso is not enough to sustain a final decree without it. Even an agreement that a final decree may be entered will not suffice.[66] Moreover one defendant can assign as error irregularity in a decree pro confesso against another defendant.[67]

§ 378. Final decree: when taken.—And one final caution must be observed. A final decree cannot be made upon a decree pro confesso on the same day that the latter is taken. It is necessary to delay at least one day.[68]

After observing the above steps, a final decree may be entered upon a decree pro confesso granting such relief as the facts alleged entitle the plaintiff to receive in all cases in which the defendant was served with process. Where the defendant is brought into court by publication other steps must generally be observed before final decree, and consideration of those steps requires a separate chapter.

[61] Davenport v. Bartlett, 9 Ala. 179.

[62] Bank of St. Mary's v. St. John, 25 Ala. 566.

[63] Sec. 3167, Code of 1907.

[64] Baker v. Young, 90 Ala. 426; A. G. S. R. R. Co. v. S. & N. R. R. Co., 84 Ala. 570; Jones v. Beverly, 45 Ala. 161.

[65] Angel v. Simpson, 85 Ala. 53.

[66] Durr v. Hanover Nat. Bank, 148 Ala. 363.

[67] Keiffer v. Barney, 31 Ala. 192.

[68] McDonald v. McMahon, 66 Ala. 115; Chilton v. Ala. Gold Life Ins. Co., 74 Ala. 290; Nat. Bldg. &c. Co. v. Ballard, 126 Ala. 155; New So. Co. v. Chaffin, 126 Ala. 677. See §3165, Code of 1907.

Final decree after decree pro confesso in a divorce case may be rendered in vacation. Sec. 3164, Code of 1907.

CHAPTER XIII.

Final Decrees on Decrees pro Confesso without Personal Service.

§ 379. Final decrees upon decrees pro confesso taken after publication.—Final decrees are provided for after decrees pro confesso taken upon publication without personal service; and as we have seen, no proof of the allegations of the bill has ever been required in such cases.[1] If the defendant is one who can be brought into court by publication without personal service of summons, so that decree pro confesso can be taken properly under the statute, the final decree can follow. The statutory provisions as to publication must be carefully followed, however. "Notice by publication is, at most, constructive notice, and to be valid, every substantial requirement of the statute and the rule must be complied with."[2] But while a final decree may be rendered upon a decree pro confesso taken upon publication only, the Code provides that "a decree made against a defendant without personal service, who does not appear, is not absolute for twelve months from the rendition thereof," unless he has been served with a copy of the decree, in which case the decree becomes absolute six months from such service.[3] The wisdom of this provision appears from the language of Justice Manning in Tabor v. Lorance:[4] "As the court cannot know that such defendants, or any persons authorized to represent them, have ever in fact heard of the suits referred to in the published notices thereof, the law will not allow the decrees therein to become absolute, * * * until [twelve] months have elapsed after their rendition. During that period, by statutory

[1] See § 369, ante.

[2] Per stone, J., in Holly v. Bass, 63 Ala. 387, 391.

[3] Secs. 3170, 3171, Code of 1907. Prior to the Code of 1896 the decree, unless served upon the defendant, did not become absolute for eighteen months. This statute holding the decree in obeyance dates back to the beginning of chancery procedure in Alabama. It was in the original Act of 1805. See Aiken's Digest, 289, § 23.

[4] 53 Ala. 543.

provision, the decrees are kept within the power of, and subject to revision and revocation by the court which rendered them, upon petition filed within that time, on behalf of the defendants, for rehearing, and cause shown to have the decrees set aside."

The defendants capable of being brought into court by publication only, as recited by the Code, are non-residents, those whose residences are unknown, residents who have been absent from the state more than six months after the filing of the bill, and defendants who conceal themselves so that process cannot be served upon them; proof of the fact in each case being made by affidavit.[5]

§ 380. Jurisdiction over residents and non-residents distinguished.—While the statutory requirements as to final decrees upon decrees pro confesso after publication only, are the same in the cases of all the above classes of defendants, a fundamental distinction will be noted between the jurisdiction over non-residents and that over the remaining defendants brought in by publication. All but non-residents are personally subject to Alabama laws by reason of their living in Alabama. The method by which they are to be brought into court is merely a matter for the Alabama legislature to decide. The fact that the statutes require personal service upon the defendant where he may be found, instead of merely the leaving of a subpoena at his residence or advertising for him, has nothing to do with the State's jurisdiction over him. Any judgment rendered against him is a personal judgment.[6] It may be executed by levy upon any property of the defendant found within the State after the rendition of the judgment; and if the sale of one piece under execution does not satisfy the judgment, execution may of course issue against other property.[7]

But the jurisdiction over non-residents acquired after bringing them into court by publication only is not personal. It can exist only over property found in Alabama belonging to

[5] Sec. 3104, Code of 1907.

[6] Exchange Nat. Bank of Spokane v. Clement, 109 Ala. 270; Betancourt v. Eberlin, 71 Ala. 461; Glover v. Glover, 18 Ala. 367. See § 320, ante.

[7] Sec. 3219, Code of 1907; Sayre v. Elyton Land Co., 73 Ala. 85, 103.

such non-residents, and "the jurisdiction of the court attaches only because of the power of the State over all property within its territory."[8] Therefore all proceedings against non-residents brought in by publication, if they do not subsequently appear, are essentially proceedings in rem only, whatever be their outward form; and except to the extent of the property of the non-resident brought before the court, are valueless. Unless the suit concerns particular property of the non-resident, any property out of which the claim is to be satisfied must be attached at the beginning of the suit.[9]

§ 381. Judgments over against residents and non-residents.—The first corallory to be deduced from this distinction is that suits against residents brought into court by publication, whether begun by attachment or instituted to foreclose liens, carry the right to judgments over for any unsatisfied balance of unpaid indebtedness.[10] Whereas suits against non-residents brought in by publication only do not carry such a right,[11] but amount only to condemnation.[12]

§ 382. Jurisdiction over non-residents strictly construed.—But the most important corallory is that in suits against non-residents the statutory provisions must be most strictly followed, because although all procedure is largely statutory, jurisdiction over the rights of non-residents is said to be strictly statutory, and very strictly construed. Over the rights of residents Alabama courts may have some jurisdiction without regard to statutes; but over the rights of non-residents not brought before the court personally they have no jurisdiction beyond what is granted by the legislature.[13]

§ 383. Decree valid although not at once executed.—The Code provides a method for a decree rendered without per-

[8] Exchange Nat. Bank of Spokane v. Clement, 109 Ala. 270, 280.

[9] See §§ 327, 328, ante.

[10] Sec. 3219, Code of 1907. Winston v. Browning, 61 Ala. 80.

[11] The decree over in Sayre v. Elyton Land Co., 73 Ala. 80, 103, was not set aside for this purpose; but after the decision in Exchange Nat. Bank v. Clement, 109 Ala. 270, that ground alone would have been sufficient.

[12] Meyer v. Keith, 99 Ala. 519, is of course overruled by Exchange Bank v. Clement, 109 Ala. 270.

[13] Sayre v. Elyton Land Co., 73 Ala. 80.

sonal service upon the defendant to be executed before the expiration of the twelve months within which it may be set aside;[14] and unless that method is pursued, involving the making of a bond by the plaintiff or party interested, execution of the decree is of course premature and illegal against any one affected by it. But the decree itself, unless set aside on petition by the defendant who was not served with process,[15] is good;[16] and if the plaintiff is not able or does not care to execute the bond necessary for immediate execution, he can sit still and await the expiration of the twelve months, and then have his decree executed without bond.[17] In the words of Brickell, C. J., "we must read this decree, as if upon its face were written: This decree is not absolute for [twelve] months; and within that period must not be executed unless the complainant or party interested executes a bond payable, approved, and with condition, as required by the statute."[18]

This has been the law since the Code of 1852. Under the early statute of 1805, which obtained until that time, the bond had to be executed prior to obtaining the decree;[19] and without the bond, the decree itself was invalid against the defendant not served with process.[20] Indeed the early decisions seem to indicate that any party to the cause could assign the failure to give bond as error.[21] But now, since the

[14] Sec. 3176, Code of 1907. The statute has been in this form since the Code of 1852.

[15] Sec. 3171, Code of 1907.

[16] Holly v. Bass, 63 Ala. 387; Hurt v. Blount, 63 Ala. 327.

[17] Holly v. Bass, 63 Ala. 387; Sayre v. Elyton Land Co., 73 Ala. 85.

[18] Sayre v. Elyton Land Co., 73 Ala. 85, 100.

[19] Aiken's Digest, 289, § 24; Clay's Digest, 353, § 45. The present law was compared with the early law by Stone, J., in Holly v. Bass, 63 Ala. 387, with the conclusion given in the text that the decree could not be rendered under the early law without the bond. But in Cowart v. Harrod, 12 Ala. 265, the court held that there was no objection to rendering the decree and suspending execution of it until the bond should be executed. The literal wording of the statute could not be followed, "as the condition of the bond must recite the decree." The decree was similarly suspended in Johnson v. Elliott, 12 Ala. 112.

[20] Eslava v. Lepretre, 21 Ala. 504, 526; Butler v. Butler, 11 Ala. 668.

[21] Beavers v. Davis, 19 Ala. 82; Rowland v. Day, 17 Ala. 681; Erwin v. Ferguson, 5 Ala. 158.

decree itself is valid, of course no one can complain of its premature execution but the particular defendant affected by the execution apart from the decree.

§ 384. Effect of premature execution.—If the decree is thus prematurely executed before the expiration of twelve months from its rendition by a levy and sale of property of the defendant, or if it is executed by selling property before the court in which the defendant has an interest, or if it is executed by foreclosure sale of an equity of redemption belonging to the defendant ascertained by the decree, the bond not being given as provided for by statute, such execution deprives the defendant of his property illegally, and he has a right to complain. The Supreme Court has refused to hold such an execution or foreclosure sale void, because it was not necessary to hold it absolutely void in the case before the court;[22] but it is undoubtedly voidable if objected to within the proper time.

§ 385. When objection to premature execution raised.—Confusion must not be made between the statutory period of twelve months within which the decree may be set aside, and the time within which premature execution of the decree may be objected to. There is no provision in the Code as to the time after a premature execution sale under the decree, within which objection must be made. Justice Stone said by way of dictum in Holly v. Bass,[23] that the omission of the bond "would furnish good ground for refusing to confirm the sale, or for setting it aside, if moved for within a reasonable time," basing his statement upon the decisions upon motions to set aside execution sales for other defects.[24] The effect of those decisions is that the motion, if made after confirmation of the sale, must be made within a reasonable time; and that time of course cannot be definitely settled. "The proceeding is of an equitable nature, to be determined upon equitable principles, not always regulated by fixed

[22] Sayre v. Elyton Land Co., 73 Ala. 85.

[23] 63 Ala. 387, 390.

[24] McCaskell v. Lee, 39 Ala. 131; Daniel v. Modawell, 22 Ala. 365; Henderson v. Sublett, 21 Ala. 626; McCollum v. Hubbert, 13 Ala. 289; Mobile Cotton Press v. Moore, 9 Porter, 679.

rules;" and the Supreme Court is not disposed to reverse the decision of the chancellor "upon the question of laches involved in such a case, unless thoroughly convinced that he has erred."[25] In Sayre v. Elyton Land Company,[26] the leading case upon the effect of premature execution of decrees upon decree pro confesso without bond, the preceding decisions that all execution sales must be objected to within a reasonable time were followed, but an effectual distinction was made between resident and non-resident objectors. "If the facts are unknown to the party complaining, or have been concealed, or he has been without the country, the lapse of time, short of the period which will operate a bar under the statute of limitations, is of less importance than when the party is fully informed, and is not under disability, or absent from the State."

Other considerations suggested by the court were the possibility of the parties having confirmed the sale in pais by accepting fruits of the sale, or by acquiescing "until subsequent interests are acquired in the lands, and improvements have been made, rendering it difficult to place the purchaser in statu quo." In the case itself the party complaining had resided without the State four years, and had knowledge of the sale, but was uninformed of its irregularity, and the lapse of five years was held not to prevent setting the sale aside.

§ 386. Purchase by a stranger at premature sale.—The distinction was also pointed out in the opinion in Sayre v. Elyton Land Co.[27] between the cases where the purchaser at premature sale is the owner of the decree, and where the purchaser is a stranger. If the plaintiff or owner of the decree buy in the property sold under premature execution, there is no reason why the sale should not be set aside at any time short of the bar of the statute of limitations, because until that time he is entitled in equity to no more than the amount of his decree and interest, the execution being illegal. But if a stranger, in good faith, be the purchaser of the property, it

[25] Per R. W. Walker, J., in McCaskell v. Lee, 39 Ala. 131.

[26] 73 Ala. 85.

[27] 73 Ala. 85, 103.

was suggested that, "his rights would probably be protected, as they would be protected if he had purchased under process issuing on a judgment or decree which was subsequently reversed."[28]

This suggestion was mere dictum, but not unlikely would be followed as ground for protecting the stranger in his title from all attacks made upon the execution apart from the decree upon which the execution sale was had. It could not exempt the stranger, however, from liability to have his purchase set aside as an incident to setting aside the decree upon which the execution was based, if the defendant should exercise his statutory right of petitioning the court to set aside the decree for good cause during the twelve months before it can become absolute.[29]

§ 387. The purpose of the bond.—It has been suggested with some plausibility[30] that the bond provided for by statute is intended to take the place of the property levied upon under the execution; and that when the stranger purchases the property, he is entitled to hold it, leaving the petitioning defendant to look to the bond.

In the case of personalty sold under execution such a construction may be sound, but in the case of realty it is clearly contrary to the wording of the statute. The bond is conditioned "to pay the pecuniary value of the personal property which may be disposed of, or placed beyond the control of the court or party;" but "to account for the value, rents and profits of any real estate transferred by operation of such decree, and further, to abide and perform such decree as the court may render, if the decree taken on the bill pro confesso is set aside."[31] The defendant is authorized to petition the court to set aside the decree and allow him to defend on the merits; and "upon the hearing of such petition, the chancellor has full power to open the decree and proceed with the cause as if no decree had been rendered therein."[32] Moreover such

[28] Marks v. Cowles, 61 Ala. 299, 304.

[29] Sec. 3171, Code of 1907.

[30] The suggestion does not appear in the reports.

[31] Sec. 3176, Code of 1907.

[32] Sec. 3171, Code of 1907.

a construction was not given to the early Act of 1805 from which the present statutes have come down; although the bond was by that Act an incident to the rendition of the decree itself, and not as now an incident to the execution. The Act of 1805 provided that "The complainant shall, before obtaining any decree by virtue * * * of this Act, give good and sufficient security in such sum as the court may direct, to abide such order touching the restitution of the estate or effects to be affected by such decree as the court may make concerning the same, on the appearance and petition of the defendant to have said cause reheard."[33] The wording of the present statute is materially different, it is true, but if the legislature had intended so radical a difference as the substitution of the bond for the property, such an intent would have been made clear beyond question. It seems probable, therefore, that the obligation in the present statutory bond "to account for the value of the real estate" means to make up for any depreciation of the real estate by way of waste or alteration which may result from the possession of the purchaser if it should be restored to the defendant.[34] All the decisions speak of the system of statutes as intended to preserve intact, until the decree becomes absolute, the interests of the defendant brought into court by publication, so that he may present himself and conduct his defense just as if he had been originally served with summons.[35]

§ 388. Order forbidding execution without bond.—Justice Stone said that the court on rendering a final decree on a decree pro confesso without personal service, "should make an order that the decree shall not be executed, until the complainant, or party interested, execute the bond the statute requires."[36] So it is doubtless the better practice to do so. But the statute is silent upon the subject of such an order;

[33] Aiken's Digest, 289, § 24.

[34] This construction has been adopted by Chancellor A. H. Benners, of the N. W. Chancery Division.

[35] Holly v. Bass, 63 Ala. 387; Lehman v. Collins, 69 Ala. 127; Seely v. Smith, 85 Ala. 25. In the last case the plaintiff had bought the land sold under the decree and transferred his right to a stranger.

[36] Holly v. Bass, 63 Ala. 387.

and Chief Justice Brickell afterwards rendered it unnecessary by holding that the statutory prohibition against execution without bond must be read into the decree itself;[37] and this has been since held on collateral attack, the absence of such an order being no defect in the record.[38]

§ 389. Copy of decree to be sent to defendant.—The statute does provide, however, that when a decree is rendered upon decree pro confesso without personal service, "the court must direct a copy of the decree to be sent to such defendant, or, in case of infants, or persons of unsound mind, to their guardians, if their residence can be ascertained."[39] And it has been suggested that the failure to comply with this requirement might prevent the decree from becoming absolute within the statutory period.[40] But this failure is not ground for reversing the decree;[41] and as the record need not show the sending of the decree, it will be presumed to have been done on collateral attack, where nothing but the record can be inquired into.[42]

§ 390. Decree served upon defendant absolute in six months.—If the defendant is within the jurisdiction so that a copy of the decree may be served upon him, the decree becomes absolute against him at the end of the six months from such service instead of remaining in abeyance until the twelve months have elapsed after the rendition of the decree.[43] But such service is held not to be judicial, in that it need not appear of record in the cause; and so on collateral attack execution of a decree before twelve months will be presumed regular beyond contradiction.[44]

§ 391. The bond required for immediate execution.—If execution is not delayed until the decree has become absolute but is desired immediately, as we have seen, "the plaintiff, or party interested, must give bond, with two sureties, payable to and approved by the register in a penalty to be pre-

[37] Sayre v. Elyton Land Co., 73 Ala. 85, 100.

[38] Seelye v. Smith, 85 Ala. 25.

[39] Sec. 3170, Code of 1907.

[40] Per Stone, J., in Holly v. Bass, 63 Ala. 387, 390.

[41] Holly v. Bass, 63 Ala. 387; Hurt v. Blount, 63 Ala. 327.

[42] Seelye v. Smith, 85 Ala. 25.

[43] Secs. 3173, 3171, Code of 1907.

[44] Seelye v. Smith, 85 Ala. 25, 33.

scribed by the chancellor or such register, conditioned to pay the pecuniary value of the personal property which may be disposed of, or placed beyond the control of the court or party, by the execution of the decree, and interest thereon from the time such property is so disposed of, or placed beyond such control; and to account for the value, rents, and profits of any real estate transferred by the operation of such decree, and further, to abide and perform such decree as the court may render, if the decree taken on the bill pro confesso is set aside"[45]

The statutory conditions of the bond have already been construed,[46] but the fixing of the bond and its approval should be noted. Undoubtedly the best practice is to file a petition to the court if in session, or to the register if the court is not sitting, praying the fixing of a statutory bond and the execution of the decree. And after the bond has been provided, the register should enter an order approving it: for let it be remembered that the register's, not the chancellor's approval must be obtained. By following these steps, the fact of the bond having been given and having been approved will be of record; and if the bond be subsequently lost, its absence cannot support a subsequent denial of its having been given. But these formal steps seem not to be indispensible, and are held not to be judicial; and because the statute does not require that they be part of the record, their failure to appear is not ground for collateral attack.[47] Failure to give the bond is merely ground for a motion or petition or for an original bill to cancel the execution and sale thereunder;[48] and the proceeding must be instituted in the court out of which the execution was had.[49] If the sale has not been confirmed, or if for other reason the original suit is still pending, relief should be sought by petition in that cause; but if the original cause is terminated, relief may be sought

[45] Sec. 3176, Code of 1907. A bonding company takes the place of two sureties. Sec. 1507, Code of 1907.

[46] See § 387, supra.

[47] Seelye v. Smith, 85 Ala. 25, 33.

[48] Seelye v. Smith, 85 Ala. 25; Sayre v. Elyton Land Co., 73 Ala. 85.

[49] Seelye v. Smith, 85 Ala. 25.

by an original bill; and the form or name applied to the proceeding will not limit its scope.[50]

§ 392. What is execution of decree.—In this connection it is important to know what constitutes the execution of the decree; since the statute requires the bond to be approved before the decree is executed. When the suit is one to declare a trust, or to enforce a specific obligation the effect of which is to obtain possession of property, and the decree accords that form of relief, of course the execution of the decree is the delivery of possession; and that will be withheld until the bond has been given or until the decree has become absolute. But when the decree is for pecuniary relief, and its execution involves a sale of the defendants property, whether under attachment or levy, or by way of a foreclosure, the decree is not executed until the sale has been confirmed.[51] Therefore the bond can be fixed and approved at any time before the order of confirmation has been made. Indeed it may sometimes be advisable not to fix the bond until after the sale has been had, since the pecuniary value of the personal property and the value of the real estate protected by the bond may be difficult to ascertain except by the sale.

§ 393. When bond is unnecessary.—As a corollary under the above, it is well to note, that notwithstanding the general wording of the statute, there are decrees against defendants who have not been served with process, for the immediate execution of which a bond would be surplusage; so that its omission cannot be a defect in the proceeding. If the suit concerns real estate brought before the court, and the real estate is non-productive until improvements shall be made, as vacant lots in cities, it is apparent that the defendant's interest cannot suffer by the transfer of possession before the decree becomes absolute by lapse of time. But if the execution involves a sale of the property before the court, the bond is important, unless the decree has declared that the unserved

[50] Sayre v. Elyton Land Co., 73 Ala. 85.

[51] Sayre v. Elyton Land Co., 73 Ala. 85, 96; Ex parte Branch, 63 Ala. 383.

defendant has no interest therein; for while the decree would become absolute at the end of twelve months, the sale could be attacked for an indefinite time, if the absent defendant had an interest affected by the sale apart from the decree.[52]

§ 394. Collateral attack.—The effect of the omission of the statutory requirements when brought before the court on collateral attack, has been repeatedly noted as the steps were discussed. But by way of review it is well to remark that on collateral attack in another court the record of the cause against the absent defendant unserved by process is the sole matter involved. "Only the proceedings of the court entered on record can be looked to," and "nothing need appear of record not required by law to be entered." If no objection can be made to the regularity of the publication, and it is sufficient to give the court jurisdiction of the parties, all reasonable presumptions are indulged to uphold the proceedings. Therefore the absence of all orders subsequent to the decree, the absence of the bond and any requirement of it, will not be ground to attack a premature execution sale in another court after it has been confirmed.[53]

§ 395. The petition to set aside the decree.—Finally as to the defendant's right to set aside the decree. The statute provides that the defendant against whom a final decree has been rendered upon a decree pro confesso without personal service, "may file a petition, showing sufficient cause for setting aside such decree, and permitting him to defend the suit on the merits, at any time" before the decree has become absolute; and "upon the hearing of such petition, the chancellor has full power to open the decree and proceed with the cause as if no decree had been rendered therein."[54] The decree will become absolute either by the lapse of twelve months from its rendition, or by the lapse of six months from service upon the defendant by the sheriff of a copy of the decree; and the record need not show such service, for it may be proved in defense to his petition.[55]

[52] Sayre v. Elyton Land Co., 73 Ala. 85.

[53] Seelye v. Smith, 85 Ala. 25.

[54] Sec. 3171, Code of 1907.

[55] Hurt v. Blount, 63 Ala. 327.

Apparently the petition must be sworn to; [56] and unless it is filed before all proceedings in the cause have been terminated and the parties have been dismissed, notice of such petition shall be given those in interest;[57] which probably requires notice to the persons themselves.[58] The petition may be demurred to, and may be amended, or may be dismissed on motion; and when not showing warrant for relief may be put out of court "in any manner—even the most summary."[59] On the trial upon the petition "either party may use the testimony of witnesses on file in the cause, who have died or removed from the State, or become insane;"[60] and a decree upon the petition will support an appeal.[61] But no person can make such a petition but those distinctly given the right by statute;[62] and the petition must upon its face show sufficient cause for setting aside the decree,[63] that is, the absent defendant must disclose merits in support of his desire to be admitted to defend the suit.[64]

This finishes the study of a chancery suit from the plaintiff's standpoint until the defendant has presented his defense to the suit.

[56] In Lehman v. Collins, 69 Ala. 127, omission of the verification was assigned as error, but the decision of the lower court was reversed on other grounds without noticing the want of an oath. Petitions were sworn to in Hurt v. Blount, 63 Ala. 327, and in Smothers v. Meridian Fertilizer Factory, 137 Ala. 166.

[57] Sec. 3171, Code of 1907. If the parties have not been dismissed notice is unnecessary. Lehman v. Collins, 69 Ala. 127, 130.

[58] Hinton v. Citizen's Mut. Ins. Co., 63 Ala. 488.

[59] Buford v. Ward, 108 Ala. 307, 311.

[60] Sec. 3172, Code of 1907.

[61] Tabor v. Lorance, 53 Ala. 543.

[62] Tabor v. Lorance, 53 Ala. 543; Smothers v. Meridian Fertilizer Factory, 137 Ala. 166.

[63] Sec. 3171, Code of 1907.

[64] Hinton v. Citizen's Mut. Ins. Co., 63 Ala. 488; Lehman v. Collins, 69 Ala. 127; Buford v. Ward, 108 Ala. 307; Smothers v. Meridian Fertilizer Fac., 137 Ala. 166.

CHAPTER XIV.

Disclaimers.

§ 396. Definition.—A disclaimer is a defense by which a defendant renounces all claim to the subject of the demand made by the plaintiff's bill or of that part of the plaintiff's bill to which the disclaimer is filed.[1]

§ 397. When properly filed.—When a person is made a party defendant to a suit by mistake, and the mistake of making him a party is not revealed by the bill,[2] or when he has an interest in the subject matter of the suit and is properly made a party, but the interest, whether legal or equitable, is of too little actual value to warrant the claiming, or when he is reputed to have a claim and is made a party defendant for the purpose of having the claim quieted of record, such person naturally desires to be rid of the burden of defense as quickly as possible, and that with no risk of expense. To remain silent after having been served with summons, would entail a decree pro confesso followed by a final decree against him with costs. He should therefore appear and file a disclaimer, coupled with a prayer to be dismissed with his costs.

§ 398. When made under oath.—Daniell said a disclaimer must be filed under oath;[3] but "since a disclaimer is, in point of form, an answer, and is preceded and concluded by the same formal words, and is put in and filed in the same way,"[4] although distinct in substance from an answer,[5] it is probable that under Alabama practice, the waiver of oath to the answer would waive it to a disclaimer.[6] Moreover when the suit is a statutory bill to quiet the title to real estate, the Code,

[1] Story Equity Pleading § 838. The defendant may file a disclaimer to a part of the bill, and demur, plead, or answer to the rest. Story Eq. Pl. § 839.

[2] Of course if the defendant is shown on the face of the bill to be disinterested, and therefore an improper party, he should demur. See § 181, supra.

[3] 2 Daniell Ch. Pr., 807.

[4] 2 Daniell Ch. Pr., 808.

[5] Story Eq. Pl., § 844.

[6] Sec. 3096, Code of 1907.

after recognizing a disclaimer as sufficient ground upon which to quiet the claim, expressly provides that an answer made under oath in which the defendant disclaims and denies ever having claimed, will entitle the defendant to his costs;[7] thus implying that the disclaimer may be made without oath.

§ 399. When disclaimer does not carry costs.—Sometimes, although the disclaimer is properly filed, there may be doubt whether the defendant is entitled to be discharged from all costs. Where the suit is to foreclose a mortgage, and the defendant has an interest in the equity of redemption, or other interest subject to the mortgage, and the situation has required the bringing of the suit, it may well be doubted whether the defendant should go free of costs, especially where he knew of the impending proceeding and failed or refused to make a release.[8]

§ 400. When disclaimer improperly filed.—Disclaimers are practically confined to the cases above mentioned, where the defendant's present interest alone in the subject of the suit is concerned. Of course there are cases to which what is known as a general disclaimer, or a denial that the defendant was ever interested in the subject matter of the suit, will free the defendant from further connection with the litigation, when a present disclaimer would not; because if the defendant had formerly held an interest, but had assigned it without the plaintiff's knowledge, the defendant should answer the bill and tell to whom he has assigned.[9] But generally, whenever the defendant is a proper or a necessary party to a cause, his making a disclaimer will not entitle him to a discharge. He may indeed have no interest in the suit himself, but he may be liable to the plaintiff.[10] Or the plaintiff may be entitled to his answer to aid his suit against others: so merely by filing a disclaimer a defendant cannot protect himself from answering.[11] In such cases the defendant should disclaim and answer too.

[7] Sec. 5448, Code of 1907.

[8] Silcock v. Roynon, 2 Young & Colyer, (Eng.) 376; Tipping v. Power, 1 Hare (Eng.) 405; Cash v. Belcher, 1 Hare (Eng.) 310. Compare 2 Daniell, Ch. Pr., 811.

[9] Story Eq. Pl., § 838.

[10] Tedder v. Steele, 70 Ala. 347.

[11] Bromberg v. Heyer, 69 Ala. 22.

§ 401. How to test a disclaimer.—If a disclaimer is believed by the plaintiff to be improperly filed, he should move to strike it from the file. But if the disclaimer is under oath, and the plaintiff believes he is entitled to an answer, or if the answer is insufficient, he can test the sufficiency of the pleading by exception. It seems that the filing of exceptions precludes a subsequent motion to strike, however.[12] In Bromberg v. Heyer,[13] the court considered a disclaimer upon the defendant's own motion for discharge, but the practice was not passed upon. If the disclaimer is not under oath, probably no exceptions can be filed, as an answer to which oath is waived is not subject to exception.[14]

§ 402. Practice when disclaimer allowed.—If the disclaimer is properly filed, and the fact is apparent, or if the disclaimer is allowed by the court, as where the defendant's abandonment of a claim is all that is involved, the plaintiff should dismiss his bill, unless the suit is to proceed against other parties defendant; in which event the plaintiff should amend the bill by dismissing the suit as to the party disclaiming and otherwise correcting the bill to meet the altered conditions.[15]

[12] 2 Daniell Ch. Pr., 808.
[13] 69 Ala. 22.
[14] Chancery Rule 34, Code of 1907.
[15] 2 Daniell Ch. Pr., 809.

CHAPTER XV.

The Motion to Dismiss for Want of Equity.

§ 403. Motion to dismiss for want of equity abolished.—The motion to dismiss for want of equity has been abolished by the new Code of 1907. Section 3121, which takes the place of section 700 of the Code of 1896, provides that the equity of a bill may be tested by a "general demurrer, 'that there is no equity in the bill'," and then adds, "The motion to dismiss for want of equity is hereby abolished." Moreover Chancery Rule 75 of the Code of 1896, under which this motion was usually made, has been omitted from the Chancery Rules of the Code of 1907.[1] This motion has been so long in use in Alabama practice, however, and is of so frequent occurrence in the decisions, that some attention must be given to it in a study of our system of procedure. It is not improbable, moreover, that the effect of the motion will be interpreted to be largely within the scope of the general

[1] Chancery Rule 75, Code of 1896, was as follows "**Motion to dismiss for want of equity; when heard.**—A defendant may at any stage of the cause, move to dismiss a bill for want of equity, unless a similar motion has been previously made and determined. If the cause is ready for hearing on bill and answer, or pleadings and proofs, such motion may be made and heard in connection with the final hearing." This rule was Rule 76 in the Code of 1886, and Rule 76 in the Code of 1876, being in the same language as in the Code of 1896. Rule 71 of the Code of 1867 was as follows: "**Motion to dismiss for want of equity; when heard.**—A defendant may, at the calling of the cause, when he has not demurred for want of equity, move to dismiss a bill on that ground, unless a similar motion has been previously made, or the cause is ready for hearing on bill and answer, or pleading and proofs."

And this last was the form of Rule 68, "For the regulation of chancery practice" as adopted by the Supreme Court at the June Term, 1854, published in the front of Volume 24 of Alabama Reports.

The Code of 1852 contained the following, however, as a part of the rules adopted by the Supreme Court at the January Term, 1841: "A defendant may at any time move to dismiss a bill or dissolve an injunction for want of equity."

demurrer for want of equity which has been restored to the practice as a substitute for the motion.

§ 404. Motion survives in two instances.—But apparently the motion to dismiss for want of equity is still authorized in situations described in two of the chancery rules published in the Code of 1907; one requiring a motion to dismiss the bill for want of equity if a demurrer has not been filed, before an application for a continuance for want of testimony can be considered;[2] and the other authorizing any material defendant in vacation before answer, and before the first term after the filing of the bill, on ten days notice to move to dismiss the bill for want of equity, the decree to be rendered upon it as if in term time.[3]

While all the chancery rules are declared by the Supreme Court of Alabama under the authority of the Code, which limits the power to rules not contrary to the provisions of the Code itself;[4] nevertheless these instances seem not to be such as warrant the filing of a general demurrer under the Code. If an application for a continuance to take testimony is made, it is evident that a plea or an answer is on file, and if no demurrer is already incorporated in an answer on file, it is clearly too late to file a demurrer separately; since no demurrer can be filed after a plea or an answer. Nor is the other instance different; for the rule authorizes the making of the motion in vacation, even though a plea or demurrer has already been filed. The Supreme Court may hold these motions contrary to the section of the Code above quoted,[5] but it need not necessarily do so.

§ 405. History of motion to dismiss for want of equity.—The origin of the motion to dismiss for want of equity lay in the statutory tightening of the scope of the demurrer by requiring great definiteness in pointing out defects in the bill. In the early practice the equity of the bill, apart from all formal defects, was tested by the general demurrer, assign-

[2] Chancery Rule 71, Code of 1907.

[3] Chancery Rule 74, Code of 1907.

[4] Sec. 5955, sub-sec. (4); § 3227, Code of 1907.

[5] Sec. 3121, Code of 1907.

ing as in England the ground alone that the bill was without equity, meaning that the bill was without that equity which would warrant relief if its allegations were proved and the suit were pursued to a final decree.[6] At that time a rule of practice had already been passed requiring demurrers to specify the defects in the bill to which they were directed;[7] but the Supreme Court held that rule to be "no more than an iteration of the rule which previously governed the practice of all equity courts."[8] Then the Code of 1852 provided that "a demurrer to the bill must set forth the grounds of demurrer specially, and otherwise must not be heard;"[9] and this provision was continued unchanged down through the Code of 1896, in which it appears as section 700, until it has now been modified in the Code of 1907 to allow a return to the general demurrer.

While this limitation upon the scope of demurrers was begun by the Code of 1852, it was not construed by the Supreme Court until 1875,[10] when it was given the full force of its words, and held to prohibit the hearing of a demurrer assigning merely the want of equity in the bill. But in the meanwhile it was evidently not supposed by the Supreme Court to prevent the use of the old general demurrer; for as late as the Code of 1867 the chancery rules promulgated by the Supreme Court recognized a general demurrer for want of equity as still existing.[11]

Prior to the enactment of this section upon demurrers in the Code of 1852 a motion to dismiss a bill for want of equity had been recognized, but it may have applied only to bills for injunctions, as it was mentioned in that connection.[12] Its

[6] 1 Daniell Ch. Pr., 599.

[7] Clay's Digest, 616. Rule 30 of chancery practice. A statute authorized demurring generally, however. Clay's Digest, 351, § 36. Act of 1823.

[8] Wellborn v. Tiller, 10 Ala. 305, 310.

[9] Code of 1852, § 2900.

[10] Chambers v. Wright, 52 Ala. 444, followed in Hart v. Clarke, 54 Ala. 490, and since recognized as law. Hooper v. Savanah & Memphis R. R. Co., 69 Ala. 529.

[11] See Chancery Rule 71, Code of 1867, given in footnote (1), ante.

[12] See Code of 1852, Chancery Rule 31. See footnote (1) ante.

general application was not distinctly recognized until Rule 68 for the regulation of chancery practice adopted by the Supreme Court in 1854, which seemed to regard it as interchangeable with the general demurrer. And this continued unchanged until after the decision above cited [13] held the general demurrer abolished. Then the Supreme Court fell back upon the motion to dismiss for want of equity and promulgated the rule which directed its use until the Code of 1907.[14]

§ 406. Effect of motion to dismiss for want of equity.— After the motion to dismiss for want of equity was thus recognized, its general effect was construed by the Supreme Court to be the same as that of the former general demurrer for want of equity. In the language of Brickell, C. J., in rendering the first decision upon the motion,[15] "Like the general demurrer which was usual in our practice prior to the Code, a motion to dismiss a bill for want of equity directs attention wholly and exclusively to the equities of the bill, not to its frame, or the want or misjoinder of parties, or other matter, which if a demurrer were interposed, would be regarded as waived, if not specially assigned. * * * That motion should prevail only when admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relieve whatever." This construction was of course either a violent disregard of the intention of the section of the Code abolishing the general demurrer, or it was an indirect reversal of the prior construction put upon that statute by the Supreme Court;[16] but it was undoubtedly justified; for chancery practice could not well do without any method of making preliminary test of the equity of a bill. And Chief Justice Brickell's construction of the

[13] Chambers v. Wright, 52 Ala. 444, decided in 1875.

[14] Chancery Rule 76, Code of 1876; id., Code of 1886; 75, Code of 1896.

[15] Hooper v. Savannah & Memphis R. R. Co., 69 Ala. 529, 533, decided in 1881.

[16] Justice Brickell seems to have adopted his construction from the Tennessee practice. See his language and references in the same decision, Hooper v. S. & M. R. R. Co., 69 Ala. 533.

effect of the motion to dismiss has remained law to the present day.[17]

§ 407. Amendable defects disregarded.—It has frequently been said that upon a motion to dismiss for want of equity "all amendments are considered as made;"[18] and this may have induced the belief that in this respect the motion was different from the old general demurrer. But this was really nothing more than saying that the motion was directed solely to the equity of the bill, the meaning which was given to the general demurrer.[19] If the facts of the bill were not clearly stated, but were sufficient to show that a cause of action had arisen, "if it is apparent upon a proper statement of the facts and an appropriate prayer, equitable relief may be obtained, the motion should be overruled, the respondent put to his demurrer, or leave granted the complainant to amend, obviating the defects in the bill."[20] Although the allegations of the bill be presented in contradictory aspects, so that on a decree pro confesso the facts could not be ascertained, yet a motion to dismiss for want of equity would have been overruled, because the contradiction could have been remedied by striking out one aspect by amendment,[21] leaving the bill showing equity upon its face.

§ 408. Facts must appear upon face of bill.—But in ruling upon the motion, the equity of the bill was considered from those facts alone which were apparent upon its face. However much the court might believe that additional facts could be alleged, only those presented, or involved in conclusions

[17] Seals v. Robinson, 75 Ala. 363; Glover v. Hembree, 82 Ala. 324; Harland v. Person, 93 Ala. 273; Pate v. Hinson, 104 Ala. 599; S. & N. A. R. R. Co. v. H. A. & B. R.R. Co., 117 Ala. 395; Brown v. Mize, 119 Ala. 10; Sullivan v. Vernon, 121 Ala. 393; Gardner v. Knight, 124 Ala. 273; Blackburn v. Fitzgerald, 130 Ala. 584; Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193; Turner v. City of Mobile, 135 Ala. 73; Edins v. Murphree, 142 Ala. 617; Merritt v. Ala. Pyrites Co., 145 Ala. 252; Peters v. Rhodes, 47 So. Rep. 183.

[18] Turner v. City of Mobile, 135 Ala. 73, 130; Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193.

[19] Wellborn v. Tiller, 10 Ala. 305.

[20] Hooper v. Sav. & Mem. R. R. Co., 69 Ala. 529; Merritt v. Ala. Pyrites Co., 145 Ala. 252.

[21] Taylor v. Dwyer, 131 Ala. 90.

presented, could be taken as admitted by the motion, and made the basis of the equity of the cause. "It is only when it appears from the bill that amendments can be made which would entitle the complainant to relief, that such amendments will be considered as made, and the motion to dismiss for want of equity denied."[22]

§ 409. Bill could not be amended after decree upon motion: —The conclusion was, therefore, that after a motion to dismiss a bill for want of equity had been sustained no further opportunity remained to the plaintiff to amend his bill. It is probable that in most cases this conclusion did not really cut off a right of amendment; because when a suit has received due study, averments other than formal, if omitted from the original bill, would generally work a departure and be disallowed as amendments if objected to for that reason alone. But of course many omissions of facts could be inserted by amendment which would give equity to a bill if the amendment could be made after the motion to dismiss was sustained. For a time the Supreme Court decisions tended to depart from the original decision in Hooper v. Savannah & Memphis R. R. Co.[23], and were supposed to allow the plaintiff to amend after a decree upon the motion.[24] But that departure was afterwards corrected, and all the late decisions held that after the motion was sustained, no amendment to the bill could be made.[25]

§ 410. Proper time to make motion.—The above propositions having been established as to motions to dismiss for want of equity, it is apparent that the proper time to make the motion was at the first step in the defense, for if the bill

[22] Per McClellan, C J., in Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193.

[23] 69 Ala. 529.

[24] Bell v. Montgomery Light Co., 103 Ala. 275; Kyle v. Mary Lee Coal & Ry. Co., 112 Ala. 606.

[25] Turner v. City of Mobile, 135 Ala. 73, 130; Blackburn v. Fitzgerald, 130 Ala. 584; Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193; Edins v. Murphree, 142 Ala. 617.

It seems to have been within the chancellor's discretion, however, to allow time in the decree to insert facts in the bill to give a statutory bill equity. Corona Coal and Iron Co. v. Swindle, 44 So. Rep. 549.

was then held bad, the suit was out of court. At later stages of the cause its value was proportionately lost; and to file it on the final submission upon bill answer and testimony, was to throw it away; for as we shall see later, relief can never be given upon any bill which does not show equity at the hearing.

This conclusion is important in considering the wisdom of filing a demurrer for want of equity since the Code of 1907.

CHAPTER XVI.

DEMURRERS.

§ 411. Definition and purpose of demurrer:—A demurrer is a defense interposed by the defendant before answering the bill or setting up matter in defense of it. It is a protest that even if the allegations of the bill, or of that part of the bill demurred to, should be proven to be true, the plaintiff would gain nothing by them at the hearing on account of the defects in the bill which the demurrer points out. It suggests therefore that time would be wasted by going further with the cause, and prays the court to dismiss the bill at once.

Demurrer is from the Latin, demoratur, meaning that the defendant will go no further,[1] and the demurrer seems to have been adopted from the common law;[2] where it was an early feature of pleading.[3] But another important office of the demurrer is that if successful in terminating the cause it saves the defendant from giving discovery by answering the bill; and this seems to be the chief reason why it was introduced into equity.[4]

§ 412. Demurrer filed to bill only.—A demurrer can be filed to the bill only.[5] It is not the proper method to test a plea or an answer,[6] their validity being tested by other methods, as we shall see later.

§ 413. Value of the demurrer as affected by amendments to bill.—The fundamental purpose of a demurrer being therefore to terminate the cause without further proceedings and the incurring of further costs, the question is immediately presented whether a demurrer is of any real service in Alabama pleading, where the right of amendment is so completely established. It is often declared by old practitioners

[1] 1 Daniell Ch. Pr. 598.

[2] Langdell, Eq. Pl. § 92.

[3] Cf. J. S. of Dale v. J. S. of Vale, Hilary Term, 1474, reported in Jenkins Century Cases, 133. And see Coke upon Littleton. 71 b.

[4] Langdell, Eq. Pl. § 94.

[5] Langdell, Eq. Pl. § 94.

[6] Glaser v. Meyrovitz, 119 Ala. 152; Freeman v. Pullen, 119 Ala. 235.

that the defendant should never demur, since he merely thereby aids the plaintiff in making a better bill. The question is therefore so important as to require discussion before examining further the nature of demurrers and the decisions upon them, for if the demurrer can no longer terminate the suit, and if no other benefit attendant upon it can be pointed out, of course it should be dropped from our practice. Certain it is that an amendment to the bill means a prolongation rather than a termination of the suit; and if amending the bill does not aid the defense, it should not be compelled by the defendant.

§ 414. Purposes of the demurrer classified:—Without anticipating the complete classification of demurrers, which will be made in a later section, it will be helpful to note at once that the purposes for which a demurrer would be filed, leaving out of consideration whether or not an amendment might follow its being sustained, must necessarily fall within three classes. First, it might be to protect the defendant from answering the bill and revealing facts which he would prefer not to publish. But of course that would apply in the main to those answers only to which the defendant's oath has not been waived in the bill. Secondly, the purpose might be to attack the right to bring the suit; involving the substance and equity of the bill as dependent upon the facts alleged. And thirdly, the purpose might be to compel the plaintiff to put his case into a form in which the defendant could better defend. Questions of parties and multiplicity of causes or multifariousness, as it is called, though technically classed as matters of substance by most of the books,[7] when raised by a demurrer clearly fall within the third purpose, above distinguished, since they enable the defendant to identify his assailant and to limit the scope of his defense.

§ 415. Value of demurrers to prevent discovery.—If the demurrer is filed in the hope of preventing discovery by the defendant, it is of course of service as long as it is effective

[7] Mr. Justice Story classed multifariousness and want of proper parties, or misjoinder of parties, as defects of form. Story, Eq. Pl. § 527.

for that purpose, even though an amendment to the bill may render the discovery eventually necessary. But even after frequent amendments the plaintiff may fail to make a good case, and in the meantime the defendant who has failed to agree with his adversary may find settlement easier by having shown his spurs. So whenever the prime purpose of the demurrer is to avoid answering, it should be availed of notwithstanding the plaintiff's right of amendment.

§ 416. Value of demurrers to formal defects.—Leaving aside for the present the second purpose of demurrers stated above, let us determine the value of demurrers for formal defects in the bill. When the defect is purely one of form, as that the plaintiff's place of abode is not stated, when it is not a matter of identification, or that the allegations of the bill are not made with certainty upon matters of which the defendant is fully informed and against which he does not purpose to defend,—in short, when the cause of action is sufficiently set forth for the defendant to be protected from another suit by a final decree, and the only effect of the demurrer is delay, it should never be the policy of a high-toned solicitor to demur. But when the formal defect is an omission of an offer to do equity in cases where the plaintiff would not be entitled to the relief he prays without doing equity himself, or when the oath has been omitted to a bill for discovery, a bill for an injunction, or the like, which are matters of form,[8] the correction is necessary to the defendant's self-protection, he expects it to be accomplished by an amendment to the bill, and will always demur to that end. Again, if the bill is multifarious, the plaintiff may be required by a demurrer to strike out much of the substance of his bill, thereby reducing for the defendant the burden of answering and defending; and this the defendant should always insist upon, to avoid the danger of the litigation becoming confused. Moreover by section 3095 of the Code of Alabama, multifariousness is waived by the defendant unless raised by demurrer.

So errors in the choice of parties to the bill frequently occasion difficulties to the defendant or a multiplicity of suits;

[8] 1 Daniell Ch. Pr. 625.

although as we have seen, the plaintiff always had the right to correct such a defect by amendment.[9] So where the bill fails to contain the whole matter in dispute.[10] These and many other defects which the plaintiff may cure, the defendant should deliberately raise by demurrer; for having been compelled to litigate, it is usually to his interest to complete the litigation in one cause and to protect himself from further suits.

§ 417. Value of demurrer to equity of bill.—But to establish the value of the above uses of demurrers notwithstanding the accompanying right to amend the bill, requires only to name them. The purpose mentioned second is the doubtful one. The question is, does it pay for the defendant to file a demurrer to the equity of the bill if the plaintiff can amend the bill after the demurrer has been sustained?

If it be established that the plaintiff can introduce additional facts by amendment which will give his bill equity when on demurrer it has been held to be wanting, as a general proposition, it would be foolish for the defendant to demur. If the bill lacks equity, it will be dismissed at the hearing upon pleadings and proofs, without any demurrer; since no testimony can give equity to a suit if the bill does not state a case which contains it;[11] and the avoidance of the burden of taking testimony upon a bad bill, would be poor compensation to the defendant for having to defend the bill made good by his demurrers. Of course there are cases where the defendant is certain that the bill sets forth the plaintiff's best case, and where he knows that the plaintiff would not attempt to amend by adding averments uncertain of proof; in those cases, the defendant would file a demurrer for want of equity, without regard to the plaintiff's right of amendment. But from their nature such suits are usually amicable, and do not affect the question under general investigation. The value therefore of the general demurrer for want of equity or the demurrer

[9] See §§ 165, 166 ante. Sec. 3126, Code of 1907.

[10] The bill is subject to demurrer if its shows on its face that it does not present the whole matter involved. See § 220, et seq. supra.

[11] See § 188 supra. And see Story, Eq. Pl. §447.

to the jurisdiction, as it is sometimes called, depends upon whether the plaintiff can amend his bill after the demurrer has been sustained. Under the English practice he could not do so.[12]

§ 418. Demurrer for want of equity supplants motion to dismiss.—We have seen that for many years prior to the Code of 1907, the general demurrer for want of equity was not in use in Alabama, and that its office was performed by the motion to dismiss the bill for want of equity, apparently a creation of Alabama practice.[13] We have also seen that this motion, as interpreted by the Supreme Court of Alabama was directed only to the equity apparent upon the face of the bill at the submission of the motion, without regard to what equity might be injected into the bill by omitted facts;[14] and that notwithstanding the existence of additional facts which might give the bill equity, the plaintiff could not insert those facts by amendment after a motion to dismiss the bill for want of equity had been sustained.[15] We know that this effect was conferred by the Supreme Court of Alabama upon the motion to dismiss for want of equity in the face of the Alabama statute of amendments in force at the time, which provides that "amendments to bills must be allowed at any time before final decree";[16] and that the only excuse given for refusing to allow amendments was that upon the motion to dismiss for want of equity, formal defects in the bill were disregarded, or considered as remedied; which amounted only to confining the scope of the motion to the equity of the bill.[17] And it was under these circumstances that the Code of 1907 abolished the motion to dismiss for want of equity, and provided that if the defendant desires to test the equity of the bill he may do so by a general demurrer "that there is no equity in the bill."[18]

§ 419. Effect of general demurrer for want of equity discussed.—It is apparent that the intent of the legislature in abolishing the motion to dismiss and reestablishing the gen-

[12] 1 Daniell Ch. Pr. 668.
[13] See §§ 403, 405 supra.
[14] See § 408 supra.
[15] See § 409 supra.
[16] Sec. 3126, Code of 1907.
[17] See § 407, supra.
[18] Sec. 3121, Code of 1907.

eral demurrer for want of equity, was either to abolish the effect of the motion to dismiss, and to establish the right to give the bill equity by amendment after being found wanting; or the legislative intent was merely to substitute the historical method of testing the equity of the bill for the local and peculiar method, leaving the effect of the proceeding unchanged. Of course the fact that the effect given the motion to dismiss was given in the face of the statute of amendments, will be a precedent to the Supreme Court for disregarding that statute in defining the effect of the general demurrer; and if the effect of cutting off amendment can be given to the general demurrer for want of equity by no other process of reasoning, it is to be hoped that the Supreme Court of Alabama will take that course: for we have seen that as a general rule, to demur to a bill for want of equity when the plaintiff can amend after the motion is sustained, would be very bad practice.

But it may be argued with some force that no right of amendment remains to the plaintiff after the demurrer for want of equity has been sustained apart from the history of the motion to dismiss.

§ 420. Amendment not allowable after final decree:—We have seen that the time limit to the right of amendment is the rendition of the final decree.[19] The scope of the statute of amendments to be avoided is defined by the wording, "Amendments to bills must be allowed at any time before final decree."[20] Therefore the point to decide with reference to the right of amendment before we can determine whether an amendment can be had after a demurrer for want of equity has been sustained, is the meaning within the statute of a final decree.

§ 421. What is a final decree?—In Ex parte Elyton Land Co.[21] Chief Justice Brickell said: "Taken in a strict, technical sense, the final decree of a court of chancery is the sentence of the court, finally and conclusively determining all the matters in controversy, disposing entirely of the cause, leaving

[19] See § 352, supra.
[20] Sec. 3126, Code of 1907.
[21] 104 Ala. 88.

nothing further for the court to do. Such is not the meaning of the term 'final decree', as it is employed in the statute [governing appeals.] The test of the finality of a decree to support an appeal is not whether the cause remains in fieri, in some respects, in the court of chancery, awaiting further proceedings, necessary to entitle the parties to the full measure of the rights it has been declared they have; but whether the decree which has been rendered, ascertains and declares these rights—if these are ascertained and adjudged, the decree is final and will support an appeal." This case, it is true, involved the finality of the decree from the standpoint of another statute than that of amendments; and practically all the cases discussing the finality of decrees considered it from the standpoint of whether an appeal was properly taken.[22] But down to the most recent cases the burden of the decisions is that a decree is final which settles the equities of the bill; and in Alexander v. Bates [23] Justice Sharpe said, "The finality of a decree is not determined by the stage of the suit at the time it is rendered, but upon whether it concludes a party in imposing on him a liability or in depriving him of a right." So in determining the effect upon a suit attempting to avoid a judgment rendered in the federal court dismissing a bill upon sustaining a demurrer for want of equity under federal practice, Justice Dowdell said, "It makes no difference that the decree was rendered on a demurrer to the bill, since the demurrer was a confession of the facts as stated in the bill, and having been directed to the equities of the bill, based on the facts as averred, was tantamount to a decree on the merits upon a final submission."[24]

§ 422. Decree of dismissal on demurrer.—Whatever be the effect of a decree sustaining a general demurrer for want of equity with reference to the right remaining to the plaintiff

[22] Compare the discussions in the opinions in Jones v. Wilson, 54 Ala. 50; Broughton v. Wimberly, 65 Ala. 549; Walker v. Crawford, 70 Ala. 567; Cochran v. Miller, 74 Ala. 50, 61; Adams v. Sayre, 76 Ala. 509.

[23] 127 Ala. 328, 342. And see the earlier authorities reviewed in Woodruff v. Smith, 127 Ala. 65.

[24] Stein v. McGrath, 128 Ala. 175.

to amend his bill, the bill will not stand dismissed without its being expressly so ordered. A decree only sustaining the demurrer is held not to be a final decree.[25] But where the decree sustaining a demurrer is united with a final disposition of the cause, it has been said to be final, because, as we have seen, the right of amendment must be claimed even though it may exist.[26] The decision in Herstein v. Walker[27] really involved a decree upon a petition to be allowed to file a replication to a plea after an attempted demurrer to it had been sustained; but the opinion of Stone, C. J., contained a dictum that a decree dismissing a bill upon a demurrer may be final. "A decree settling the equity raised by the pleadings, and adjudging the rights of the parties, on a submission for decree on the merits, is certainly a final decree. (Citing authority.) The decree * * * not only settled every equitable question raised, but made final disposition of the entire costs of the suit. And it makes no difference that the ruling was on demurrer. When a demurrer is sustained, or overruled, and a final decree suffered to be rendered without asking leave to amend or reply, as the case may be, and the term of the court is permitted to expire; this is to all intents a final decree on the questions raised, or which could be raised on the proceedings; and as to such questions, the losing party is without remedy save by appeal, or, in a proper case, by bill of review."

The reasoning may be confused in treating amendments in connection with final decrees. What was meant by the court seems to be that a decree on a demurrer coupled with final disposition of the cause, is a final decree. But the wording shows that the court considered a demurrer disposing of the equity of the bill to be a proper basis for a decree disposing of the cause; and as such the dictum may be cited in support of the position that the new general demurrer for want of equity, when sustained, cuts off further amendment of the bill, and warrants a dismissal of the cause.

[25] Rose v. Gibson, 71 Ala. 35; Lide v. Park, 132 Ala. 222; McCrory v. Guyton, 45. So. Rep. 658.

[26] Herstein v. Walker, 90 Ala. 477. And see § 353, supra.

[27] 90 Ala. 477.

Let us now proceed to examine the different kinds of demurrers.

§ 423. Demurrers classified.—Upon analysis demurrers may be classified with reference to their purpose, as directed against discovery or against relief; or they may be classified with reference to their extent, as directed against the whole bill or against a part of the bill; or they may be classified with reference to their value, as directed in bar of the suit, as general demurrers to the jurisdiction and other matters of substance, or as directed to the correction of formalities in the bill, as special demurrers for defects of form. These classes will be discussed separately.

§ 424. Demurrers to discovery.—In the first place, demurrers are always directed either against discovery or against relief. Most demurrers are directed primarily against the relief sought by the bill; but since the bill states the plaintiff's side of the case upon which the relief is sought, and requires the defendant to admit or refute the facts as alleged, and to answer the particular interrogatories based upon the statement of the case, it often happens that the defendant by answering would reveal matters within his knowledge alone which would materially affect the suit, or which if known, would injure him apart from any effect upon the suit of the plaintiff. Of course if the oath to the answer is waived, the defendant will usually file in such cases an evasive or incomplete answer, and devote himself chiefly to setting forth his own defenses to the bill. But if the bill does not waive the defendant's oath, the defendant who does not wish to answer, will first present every available ground of demurrer to excuse himself from answering, or if that cannot be accomplished, at least to excuse himself from answering fully. Demurrers to discovery therefore are not confined to demurrers to bills for discovery only, but include all demurrers which protect the defendant from giving discovery or reply to the statements or questions contained in the bill.

§ 425. If bill is for equitable relief, demurrer to discovery not generally allowed.—Every bill seeking any form of relief within the jurisdiction of a court of equity is incidentally a bill for discovery; especially if the oath to the answer is not

waived. And it was a rule of English chancery practice that whenever a bill sought any relief whatever, other than the formal relief incidental to a bill for discovery only (such as that the testimony be perpetuated), the bill became thereby a bill for relief.[28] And if the plaintiff stated a case in his bill which would entitle him to equitable relief against the defendant, it would be unjust to deny to the plaintiff any amount of discovery from the defendant which would enable him to establish his case. As we have seen, the right to obtain the defendant's testimony was one of the foundation principles of equity procedure.[29] Therefore as a general rule, it is not allowable to answer or defend against the relief sought while demurring to the discovery.[30] The defendant must direct his demurrer against the plaintiff's right to relief; and if he fails with such a demurrer, he must answer.

§ 426. Exceptions.—But there are cases where the defendant has a good personal excuse for not giving discovery incidental to the relief prayed by the bill, although the plaintiff may be entitled to the relief prayed if he can prove his case by other evidence than the defendant's answer. These exceptions have been recited and elaborately treated by Daniell, and as they seem not to have occurred in Alabama, reference may be made to the pages in Daniell directly. The exceptions include instances "where the discovery sought would subject the defendant to punishment, or to a penalty, or forfeiture, or to anything of that nature; or where it would tend to show him to have been guilty of any moral turpitude." Additional exceptions are where the discovery would cover matters "which have been communicated under the seal of professional confidence," or 'which relate entirely to the defendant's own title and not to that of the plaintiff.'[31]

§ 427. If the bill is for discovery and legal relief, demurrer to discovery may lie.—If the bill is based upon that principle of Alabama chancery jurisdiction, however, which has been pointed out as one of its four distinguishing differences from

[28] 1 Daniell Ch. Pr. 604.
[29] See § 12 et seq., ante.
[30] 1 Daniell Ch. Pr. 605.
[31] 1 Daniell Ch. Pr. 606, 625 et seq.

English chancery jurisdiction, by which the court of chancery in Alabama upon taking jurisdiction of a cause on any equitable ground will hold jurisdiction until it has done complete justice between the parties,[32] it would seem that the defendant would be entitled to demur alone to the discovery sought by the bill, even though the discovery be incidental to the relief. Our Supreme Court has held it indispensable when a bill is filed to obtain discovery and any relief attendant upon that discovery which could be obtained at law if the facts were known, to allege in the bill "that the discovery sought is indispensable to the end of justice—or, in other words that the facts, as to which the discovery is sought, cannot be otherwise proved than by the defendant's answer."[33] And since in such cases the plaintiff will be out of court if he is not entitled to the discovery, of course to demur to the discovery alone would be allowable.

§ 428. Demurrers to relief.—All demurrers not filed to protect the defendant primarily against discovery, are essentially demurrers to relief, and it must be noted that demurrers to relief are demurrers to the particular relief prayed by the bill. It is true that sometimes relief may be granted under the prayer for general relief; but it will be recalled that as a general rule no relief can be granted under the prayer for general relief which would be inconsistent with the relief especially prayed.[34] So it would seem that if taking the whole statement of facts as alleged in the bill to be true, the plaintiff would not be entitled to any particular relief prayed, the bill would be subject to demurrer on that ground.[35] It might not be ground for demurrer that the prayer for specific relief is merely too broad;[36] but when cumulative specific relief is prayed, the defendant often desires to know at once whether the plaintiff will be entitled to all of it if the bill is proven; and if the plaintiff will not be entitled to all of it, the extent of his

[32] See § 20 et seq., ante

[33] Per Somerville J. in Shackleford v. Bankhead, 72 Ala. 476. And see Continental Life Ins. Co. v. Webb, 54 Ala. 689, 697; Guice v. Parker, 46 Ala. 616.

[34] See § 284 et seq. ante.

[35] 1 Daniell Ch. Pr. 617.

[36] Compare § 290, ante. and the discussion in the opinion in McDonell v. Finch, 131 Ala. 85.

rights should be determined upon demurrer, and the prayer be trimmed down accordingly.

§ 429. Demurrers are either partial or total.—In the second place, demurrers may be classified with reference to their extent. They are directed against the whole bill or against a part of the bill only.[37] A demurrer is not partial, however, from the fact alone that it raises in defense to the suit a defect in the cause traceable to the allegations in one section of the bill only. The analytical pleader will often discover that an entire cause hangs upon one allegation or one omission in the statement of facts, and will direct his demurrer to that fact or omission alone. It is apparent that a bill may lack equity from deficiencies in a premise of the plaintiff's argument, as well as from an improper conclusion.[38]

Again the bill may be framed in a double aspect, which requires as we have seen, that each aspect or alternative statement of the case entitle the plaintiff to the same relief; and one aspect may be shown by a demurrer to call for a different remedy from the other which would throw the whole bill out of court at once.[39] So multifariousness; so defects of parties; —indeed any defect in the bill which constitutes a defense to the whole cause of action as presented, is ground for a demurrer to the whole bill.

A demurrer to part of the bill, on the other hand, is proper when the bill presents more than one claim or basis for the suit, though the bill be not made multifarious thereby, and one of them is not a good claim, or does not constitute a cumulative ground for relief; so that the statement of it merely cumbers the cause and should be stricken out.[40] Another common ground for a partial demurrer is where the bill is in a double aspect or prays alternative relief and one aspect or prayer does not warrant any relief whatever. On a partial

[37] 1 Daniell Ch. Pr. 650.

[38] Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 136.

[39] Seals v. Robinson, 75 Ala. 363. Compare § 209 et seq., ante.

[40] Houston v. Williamson, 81 Ala. 482; Godwin v. Whitehead, 95 Ala. 409; George v. Cent. R. R. & Bkg. Co., 101 Ala. 607; Moore v. Ala. Nat. Bank, 120 Ala. 89; Worthington v. Miller, 134 Ala. 420.

demurrer pointing out that fact, the defective aspect or prayer will be stricken out.[41]

§ 430. Demurrer to part of bill must not be filed alone.— But an important rule of procedure not to be overlooked in making partial demurrers, is that a demurrer to a part of the bill, although perfectly good to that particular part, should not be filed alone. It would leave the remainder of the bill undefended; and as it is the defendant's duty to defend against the whole bill, the demurrer instead of being effective to reduce the cause to the matter of the remainder of the bill, will be overruled in toto, if the remainder of the bill contains equity.[42]

§ 431. Does a partial demurrer involve a general demurrer? It is to be noted, however, that the partial demurrer will be overruled only if the bill otherwise has equity.[43] This is involved in the statement usually made by the books that a demurrer cannot be good in part and bad in part;[44] or as said by Daniell, "if a demurrer is general to the whole bill, and there is any part, either as to the relief or to the discovery, to which the defendant ought to put in an answer, the demurrer being entire must be overruled."[45] But it seems not to be explained to us why a partial demurrer should be taken to be entire, as it necessarily must be, as it is overruled only when the remainder of the bill is without equity. Can it be because the demurrer was adopted, as we have seen, from the common law procedure, where a special demurrer always involved in addition a general demurrer? and that for that reason every partial demurrer in equity carries in its bosom a general demurrer for want of equity? No other explanation seems satisfactory.

From an Alabama standpoint it is interesting to note that such a rule of interpretation would seem to have been im-

[41] Tillman v. Thomas, 87 Ala. 321; Beall v. Lehman Durr Co., 110 Ala. 446.

[42] Beall v. Lehman Durr Co., 110 Ala. 446; Worthington v. Miller, 134 Ala. 420; Cronk v. Cronk, 142 Ala. 214; Bresler v. Bloom, 147 Ala. 504; So. Ry. v. Hays; 150 Ala. 212. And see all the other decisions in footnotes (40) and (41).

[43] Ibid.

[44] 1 Daniell Ch. Pr. 651; Story, Eq. Pl., § 443.

[45] Ibid.

possible until the general demurrer for want of equity was reestablished by the Code of 1907. And yet, as we have just seen, the holding upon partial demurrers in Alabama has always been in accord with the English chancery practice. There was a rule of English practice, afterwards adopted by the Supreme Court of the United States,[46] and probably law in Alabama, "That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to." But this would not cover every partial demurrer.

§ 432. Remainder of bill must be separately demurred to.—But while it seems to be true that every partial demurrer involves also a general demurrer, it becomes necessary either to file with it other partial demurrers or to answer the remainder of the bill; since the value of a partial demurrer as such will be lost, as we have seen, when filed alone. This point seems not to have arisen for decision by the Supreme Court of Alabama; but it is universal law. Indeed the defendant may demur to one part of the bill, plead to another, and answer to the remainder, if he sees fit.[47] But if he pursues that plan, he must be mindful that his demurrer, his plea, and his answer do not overlap, but apply to clearly distinct portions of the bill; for it is another old rule of chancery procedure, that a plea or an answer filed to the same part of the bill to which a demurrer also is filed, overrules the demurrer and waives a decision upon it; and the same effect is given to an answer filed on top of a plea.[48] This is apart however from the statutory right in Alabama to incorporate a demurrer or a plea in the answer, which will be discussed later.

§ 433. Demurrers are either general or special.—In the third place, demurrers may be classified with reference to their value, as directed in bar of the suit, when they are called general demurrers, or as directed to the correction of

[46] 36th order of English Court of Chancery of 1841; Rule 36 of Equity Rules of Supreme Court of U. S., January Term, 1842. See Story, Eq. Pl., § 443.

[47] Story, Eq. Pl., § 442; 1 Daniell Ch. Pr. 652, et seq.

[48] Story, Eq. Pl., § 442; 1 Daniell Ch. Pr. 659.

formalities in the bill, when they are called special demurrers.

It is commonly said that demurrers are either general or special, and that general demurrers are directed against matters of substance in the bill, while special demurrers are directed against matters of form in the bill. But while this division is true in the main, it is inaccurate in so far as it defines general and special demurrers.

§ 434. General demurrers described.—A general demurrer is one which attacks the substantial merits of the bill, and it may do this in several ways: first, it may attack the jurisdiction of the court to grant the relief prayed upon the facts stated, which is the demurrer for want of equity;[49] or second, it may attack the capacity of the plaintiff to bring the suit;[50] or third, it may raise objection on account of the misjoinder or non-joinder of the parties;[51] or fourth, it may raise the objection of multifariousness;[52] or fifth, it may raise the objection that the plaintiff's suit is barred by laches or lapse of time;[53] or sixth, it may raise the objection that the bill is bad for uncertainty.[54] While these six uses may not include all the instances of demurrers to matters of substance, they probably cover those to be met with in the Alabama decisions. Daniell recites ten instances of defects of substance in bills;[55] but with the exception of one or two very uncommon ones, as that the value of the matter involved is beneath the dignity of the court, and that the bill shows another suit to be pending upon the same matter, which latter objection is not raised by demurrer in Alabama,[56] they may be reduced on analysis to the above six.

§ 435. Special demurrers described.—A special demurrer is one which raises objection to formal defects in the bill, primarily, under Alabama practice, to enable the defendant

[49] Wellborn v. Tiller, 10 Ala. 305; Pate v. Hinson, 104 Ala. 599.

[50] See § 67, ante.

[51] Whitaker v. DeGraffenreid, 6 Ala. 303; Gould v. Hayes, 19 Ala. 438.

[52] McIntosh v. Alexander, 16 Ala. 87.

[53] James v. James, 55 Ala 525, Lovelace v. Hutchinson, 106 Ala. 417.

[54] Whitaker v. De Graffenreid, 6 Ala. 303.

[55] 1 Daniell Ch. Pr. 616.

[56] Chancery Rule 112, Code of 1907.

upon their rectification to better present his defense. The more common grounds for special demurrer as named by Daniell[57] were, first, that the plaintiff's place of abode was not given; second, that the facts within the plaintiff's knowledge were not alleged positively; third, that the bill was deficient in certainty; fourth, that the plaintiff failed to offer to do equity, fifth, that the bill was not signed by counsel, and sixth, that the affidavit to the bills requiring to be sworn to, was omitted.

But the classification of these grounds of demurrer as special in contrast to those classed above as general, is merely arbitrary. We have already seen that Mr. Justice Story classed multifariousness and defects of parties as formal defects in a bill.[58] Whereas Daniell classed them as matters of substance. And want of certainty, classed by Daniell as a defect of form, has been classed by the Supreme Court of Alabama, at least where it involved certainty in the parties to the bill, as a defect of substance.[59]

§ 436. Defects of substance and form differ only in degree.—It is apparent therefore that defects in the substance of the bill and defects in the form of the bill differ merely in the degree of their importance; and are classed as grounds for general demurrer and grounds for special demurrer respectively, according to the magnitude or the smallness of the defect. Indeed Daniell pointed out that many of the defects classed by him as matters of form, such as the offer by the plaintiff to do equity, might amount in certain cases to the determining point of the court's jurisdiction; in which cases the omission would be fatal on general demurrer for want of equity.[60]

§ 437. Effect of Decree sustaining demurrer in English practice.—Nor was there a characteristic difference between the effect of sustaining a demurrer for matter of substance and one for matter of form under English practice. Upon a decree sustaining either of them the plaintiff's suit was generally out of court, the rule by which leave to amend was

[57] 1 Daniell Ch. Pr. 625.
[58] Story, Eq. Pl., § 527.
[59] Whitaker v. De Graffenreid, 6 Ala. 303.
[60] 1 Daniell Ch. Pr. 656.

given upon sustaining a demurrer for want of parties being the only common exception.[61] The only color of distinction in the effect of a decree upon the two demurrers was in the plaintiff's attitude to file a new bill. Daniell said, "A demurrer being frequently on matter of form is not in general, a bar to a new bill; but if the court on demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in another suit."[62]

§ 438. Effect of decree sustaining demurrer in Alabama.—In Alabama the statute allowing amendments at any time before final decree[63] of course takes the place of the English practice of allowing a new bill to be filed when the merits of the case have not been gone into. And that is an important reason why an amendment should not be allowed in Alabama after a demurrer has been sustained for want of equity in the bill. And while it is true that the plaintiff in rare instances might not have presented the merits of his case in the original bill, it must be remembered that he has the benefit of the defendant's demurrer and the argument of it before his right to amend is cut off by the rendition of the decree. And surely the plaintiff is not the only one to be considered; the defendant, who usually is the possessor of property held in litigation by the suit, has a right to be considered also.

§ 439. Ground of demurrer must be assigned.—It has always been a rule of chancery practice that the objection to the bill made ground of demurrer, must be made known in making the demurrer.[64] Where the demurrer was filed on the ground that equity had no jurisdiction of the cause, it was sufficient in England to assign that the bill lacked equity; and so generally when the demurrer raised substantial defects on account of which the bill showed no good cause of action in equity by the plaintiff against the defendant.[65] But a demurrer for want of parties was required to name the parties wanting; and a demurrer for multifariousness was required to state formally that the bill united dis-

[61] 1 Daniell Ch. Pr. 668, et seq.
[62] 1 Daniell Ch. Pr. 671, citing Lord Redesdale, (Mitford) 215.
[63] Sec. 3126, Code of 1907.
[64] 1 Daniell Ch. Pr. 655.
[65] Ibid.

tinct matters upon one record, "and show the inconvenience of so doing."[66] So also definite grounds for every special demurrer were required to be set forth.

§ 440. Assignment of grounds of demurrer in Alabama.—In Alabama the statutory requirement introduced into the Code of 1852, that "a demurrer to the bill must set forth the grounds of demurrer specially, and otherwise must not be heard,"[67] which was continued unchanged until the Code of 1907,[68] tended to greatly increase the detail of objections assigned by demurrers. The provision was construed as we have seen to abolish the general demurrer for want of equity; and but for the development by the Supreme Court of the motion to dismiss the bill for want of equity, the general equity of a bill would have been beyond attack until the final submission of the cause upon bill, answer, and testimony.[69] As a result of the strict construction put upon the statute, it has been the custom to assign for a demurrer innumerable elaborate grounds, not pointing out defects in abstract terms, but stating and restating expressions and allegations of the bill, with the constructions sought by the defendant to be placed upon them. But now that the general demurrer for want of equity is reestablished in Alabama by statute[70] much of that burdensome detail in assigning grounds for demurrer is no longer necessary, since many of the grounds so assigned merely pointed out the want of equity in certain premises to the bill. It is to be hoped therefore that the habit of assigning so many grounds of demurrer will cease.

§ 441. Grounds for demurrer in Alabama.—From the fact that most of the Alabama decisions upon demurrers have involved defects assigned in the language of the bill themselves, abstract decisions have been rare; and it is difficult to classify the holdings in accordance with the grounds of demurrer given above as observed in English practice. But

[66] Ibid.

[67] Code of 1852, § 2900.

[68] Code of 1907, § 3121.

[69] The history of the abolition of the general demurrer for want of equity, and the rise of the motion to dismiss the bill for want of equity are set forth in Chapter XV, supra.

[70] Sec. 3121, Code of 1907.

defects of parties to the bill, whether from the incapacity of the plaintiff to sue, or his incapacity to sue alone, from the incapacity of the defendant to be sued, or his incapacity to be sued alone, from the misjoinder of parties plaintiff or defendant, or from the nonjoinder of parties plaintiff or defendant, may all be raised by demurrer in Alabama, as has been fully shown under the discussion of the subject of parties to bills in Chapters III, IV, V and VI of this book. So multifariousness is a ground for demurrer in Alabama, and has been fully discussed and the decisions cited in the chapter upon multifariousness.[71] So uncertainties, inconsistencies, and contradictions in the matter of the bill, are grounds for demurrer, as has been pointed out in earlier chapters.[72] Laches is ground for demurrer in Alabama when it appears from the allegations of the bill itself;[73] as is also the defense of the presumption of payment of a mortgage debt after the lapse of twenty years, which is based upon the staleness of the claim.[74] And the lapse of time sufficient to create the bar of the statute of limitations, may be raised by demurrer, when it appears on the face of the bill;[75] but as a rule that defense is best raised by a plea.[76]

§ 442. Other grounds of demurrer in Alabama.—Another ground of demurrer to the jurisdiction besides the want of equity in the bill, and one which is recognized both in England and Alabama, is the existence, shown upon the face of the bill, of an adequate remedy at law.[77] But this defense can be raised by demurrer "only when the bill affirmatively discloses the fact;" and it has been held that "If on the facts averred in the bill, it contains equity, unless the complainant has an adequate legal remedy, and the bill is silent as to the existence of such legal remedy, the defense based upon its

[71] See Chapter VIII, supra.

[72] See § 187, et seq; § 238, et seq; § 250 et seq., ante.

[73] James v. James, 55 Ala. 525; Lovelace v. Hutchinson, 106 Ala. 417.

[74] Solomon v. Solomon, 81 Ala. 505.

[75] Lovelace v. Hutchinson, 106 Ala. 417; Harper v. Raisin Fert. Co., 48 So. Rep. 589.

[76] Smith v. Hall, 103 Ala. 235; Snedicor v. Watkins, 71 Ala. 48; Lockard v. Nash, 64 Ala. 385.

[77] Attalla Mining & Manufacturing Co. v. Winchester, 102 Ala. 184; Tillman v. Thomas, 87 Ala. 321; 1 Daniell Ch. Pr. 609.

existence is matter for answer or plea."[78] This wording is probably too broad, however; for the Codes of Alabama have all provided that "insufficiency of the remedy at law" need not be averred,[79] thereby regonizing that the existence of a remedy at law is a judicial conclusion and not a fact which may be averred. But the language of the court was used in a decision that the plaintiff was not required to aver the insolvency of a surety upon a bond before instituting a suit in equity to reach the principal's property; and the court went on to say that the adequate remedy at law which would prevent an equity suit, was a remedy against the same person and not a different person from the one made defendant to the bill. So while the language quoted seems to be the last statement from the Supreme Court upon the point, it probably will not be strictly followed.

It is also a ground of demurrer in Alabama that the plaintiff fails to offer in his bill to do equity to the defendant, in a case in which something would be required of the plaintiff before he would be entitled to relief.[80]

§ 443. Certain defenses not presented by demurrer.—Of course it is not attempted in this work to recite all the grounds of demurrer in Alabama, as to do so would involve making a chancery digest. And without such a scope of work laid out, to refer to decisions pointing out what is not ground for demurrer, would seem illogical. But certain defenses have been presented in the past by demurrer, because seemingly apparent upon the face of the bill, and have been overruled in that form; and unless the decisions upon them are noted, they probably will be presented by demurrer again. Thus a bill is not subject to demurrer for failing to show compliance with the statute of frauds.[81] Unless the noncompliance with the statute appears affirmatively upon the face of the bill, it

[78] Per McClellan, J., in Bunn v. Timberlake, 104 Ala. 263.

[79] Sec. 3094, Code of 1907.

[80] Sloss-Sheffield S. & I. Co. v. Board of Trustees of Univ., 130 Ala. 403; Inter-State Bldg. & Loan Assn. v. Stocks, 124 Ala. 109.

[81] Piedmont Land Imp. Co. v. Piedmont Foundry & Mac. Co., 96 Ala. 389; Manning v. Pippen, 86 Ala. 357; Knox v. Childersburg Land Co., 86 Ala. 180.

must be set up in defense by answer or plea.[82] And the defense of the statute of limitations, as we have seen in the preceding section but one, has been often improperly offered by demurrer, only to be overruled. So usury does not support a demurrer to the bill as a whole, but is good only against the interest claimed in the bill.[83] And the defense of having purchased for value without notice is not properly raised by demurrer, but should be left to the answer or a plea.[84]

§ 444. Demurrer must not set up facts.—And whenever the bill does not contain upon its face enough of the defendant's intended defense to bring it within the scope of a demurrer, let the defendant not attempt to amplify the facts by telling them in the demurrer; for a demurrer is confined to the facts which appear on the face of the bill, and if it attempts to bring in additional allegations, it becomes a "speaking demurrer," as the books call it, and will be overruled for that reason alone.[85]

§ 445. More than one ground may be assigned.—But let the pleader not think himself limited to a single ground of demurrer. He can assign as many defects in the bill as he thinks he has found, and each assignment will stand as a ground in itself.[86] The whole constitutes but one demurrer, however;[87] and if the demurrer is sustained for one ground, that amounts to sustaining the demurrer. And on appeal the Supreme Court will refer the decision to any ground assigned upon which the demurrer should have been sustained,[88] apparently even though the lower court expressly

[82] Trammell v. Craddock, 93 Ala. 450. And see cases in note (81).

[83] Lomb v. Pioneer Sav. & Loan Co., 96 Ala. 430.

[84] Hanchey v. Hurley, 129 Ala. 306.

[85] Bromberg v. Heyer, 69 Ala. 22; Sanders v. Wallace, 114 Ala. 259.

[86] Kinney v. Reeves, 139 Ala. 386; Coleman v. Butt, 130 Ala. 266; Watson v. Jones, 121 Ala. 579; Donald v. Pearson, 114 Ala. 630. The decision in So. & No. Ala. R. R. Co. v. H. A. & B. R. R. Co., 104 Ala. 233, is overruled.

[87] Coleman v. Butt, 130 Ala. 266.

[88] Kinney v. Reeves, 139 Ala. 386; McDonald v. Pearson, 114 Ala. 630; Ferris v. Hoglan, 121 Ala. 240; Harper v. Raisin Fert. Co., 48 So. Rep. 589.

overruled that particular ground, and sustained others erroneously instead.[89]

§ 446. Refiling demurrers after amendment.—A demurrer after amendment of the bill is to the bill as amended, and not to the amendment alone.[90] And while the sustaining of a demurrer on any ground precludes its being refiled until the bill has been amended, after amendment the defendant may reassign grounds of demurrer already thought by the court to be bad, and have them reviewed again.[91] The reason given by the court for this, is that the sustaining of the demurrer by the chancellor on any ground is the sustaining of the demurrer; so that the grounds held bad by him are not overruled by his decree, and the expression of his opinion upon them is neither ground for appeal, nor even binding upon him if they are presented to him again.

But where the demurrer has been overruled, it is doubtful whether the mere amendment of the bill for other reasons than the points raised by the demurrer, as for instance, an amendment by adding or striking out parties, would give the defendant the right to refile the demurrer. By the English practice he could do so;[92] as he could also under the early Alabama practice;[93] but our later decisions seem to forbid it.[94]

§ 447. A demurrer when not insisted upon is waived.—It has been said that a demurrer if not insisted upon by requiring a decree upon it in the lower court, will be deemed by the Supreme Court on an appeal to have been waived by the defendant's subsequently filing an answer.[95] But this is merely a different method of stating the rule of English practice, recognized by our earlier decisions, that a plea or an

[89] Kinney v. Reeves, 139 Ala. 386.

[90] Hodges v. Verner, 100 Ala. 612.

[91] Kinney v. Reeves, 139 Ala. 386; Cottingham v. Greeley, 123 Ala. 479; Watson v. Jones, 121 Ala. 579; Ferris v. Hoglan, 121 Ala. 240.

[92] 1 Daniell Ch. Pr. 650, citing Bosanquet v. Marsham, 4 Simons, 573.

[93] Moore v. Armstrong, 9 P. 697.

[94] Elyton Land Co. v. Denny, 108 Ala. 553; Bates v. Chapman, 108 Ala. 225.

[95] Ray v. Womble, 56 Ala. 32; Corbitt v. Carroll, 50 Ala. 315.

answer overrules a demurrer not acted upon.[96] The proper practice is, however, for the defendant to move in the lower court to strike the demurrer from the file.[97]

If however, the demurrer was for multifariousness, on account of the improper joining of two causes of action; and the record, while showing no decree upon the demurrer, shows a hearing and a final decree on one matter only, the Supreme Court will presume that the plaintiff confessed the demurrer and abandoned one phase of the suit.[98]

And of course a demurrer is not waived by the filing of an answer when the demurrer is incorporated in the answer under the statutory privilege to do so.[99]

§ 448. Demurrer may be incorporated in answer.—There is a section of the Code which has come down to us from early statutes, by which "a defendant may incorporate all matters of defense in his answer";[1] and this is held to authorize the incorporation in his answer of a demurrer,[2] it being allowable even to introduce the demurrer into the answer by amendment offered at any time before final decree.[3]

The method of pleading authorized by this statute was classed in the introductory chapter of this work as one of the four distinguishing features of Alabama Chancery pleading, and its history was fully given.[4] It is believed that its introduction into the first Code, that of 1852, was because it was already too firmly established to be abolished; although it was then made a privilege, whereas it had been prior to that time compulsory.[5]

It has already been attempted to show that the defendant gains little or no benefit from incorporating a demurrer with his answer; and that any benefit to be derived from it is weighted down by the burden of the wasted labor in pre-

[96] Crawford v. Childress, 1 Ala. 482.

[97] Shaw v. Lindsey, 60 Ala. 344, 349; Harland v. Person, 93 Ala. 273.

[98] Betts v. Betts, 18 Ala. 787.

[99] Ray v. Womble, 56 Ala. 32, 40.

[1] Sec. 3115, Code of 1907.

[2] Crawford v. Childress, 1 Ala. 482.

[3] Shaw v. Lindsey, 60 Ala. 344; Reese v. Bromberg, 88 Ala. 619; Harland v. Person, 93 Ala. 273.

[4] See §§ 5, 25, 26, ante.

[5] See Appendix "C," post.

paring the answer if the demurrer be good and the bill be dismissed, and the burden of answering again if the plaintiff amends.[6] Moreover it is unnecessary to file the demurrer in order to attack the equity of the bill on final hearing; for without equity in the bill no relief at final decree can be obtained.[7] Suffice it to say, then, that the practice should not be pursued unless the pleader has an object in view sufficiently clear to reveal a benefit seemingly not hitherto pointed out by the decisions.

§ 449. The hearing of demurrers.—The register of each court is required to prepare "a docket for each term, of all the causes not finally disposed of at the previous term, and of the suits since commenced." "The causes will be placed on the docket in the order in which the original bills are filed."[8] "All demurrers, whether contained in the answer or not, are to be disposed of on the calling of the cause, without waiting for the cause to be ready on the proof; but when the cause is ready for hearing on the pleadings and proofs, it must be heard, without waiting for a separate decision on a demurrer contained in the answer."[9] And if the defendant applies for a continuance to take testimony, before a demurrer contained in the answer has been disposed of, the continuance must not be granted.[10] So the consideration of the demurrer must not be postponed until exceptions to bills or answers have been heard, but the demurrer must be heard at the same time.[11]

Demurrers may also be set down for hearing in vacation at the request of either party, the hearing to be had on ten days' notice to the other party of the time and place.[12]

In presenting the cause, the counsel for the plaintiff should first present the case made by the bill; and then the counsel for the defendant should present the demurrer.[13]

[6] See § 31, ante, and Appendix "C," post.

[7] Marx v. Clisby, 130 Ala. 502; Story, Eq. Pl., § 447.

[8] Chancery Rule 66, Code of 1907.

[9] Chancery Rule, 72 Code of 1907.

[10] Chancery Rule 71, Code of 1907.

[11] Chancery Rule 73, Code of 1907.

[12] Chancery Rule 74, Code of 1907.

[13] Chancery Rule 75, Code of 1907.

For Jefferson County, a special Act of the legislature provides that whenever any demurrer to a bill is filed, the register must immediately notify the solicitor of the plaintiff "and must on the first Saturday after three days' notice submit the cause to the chancellor for decree thereon."[14]

§ 450. Decrees on demurrers: when made.—Decrees on demurrers may be rendered by the chancellor in term time, or he may take the demurrer under advisement and render his decree during any subsequent vacation.[15] And when the hearing is had in vacation, the case shall be treated by the chancellor just as if the hearing had been had in term time.[16]

§ 451. Decrees enrolled.—All decrees made by the court in term time shall be entered at length on the minutes of the court, without reciting the chancellor's reasons for the decrees, however.[17] And whenever a decree is rendered in vacation, "it shall be the duty of the register, as soon as the same is filed in his office, to enter the same at length on the minute book of the court immediately after the minutes of the previous term, and the same shall be considered as enrolled from and after such entry, which shall be dated."[18]

[14] Acts of Alabama, 1894–95, 884.

[15] Chancery Rule 78, Code of 1907.

[16] Chancery Rule 74, Code of 1907.

[17] Chancery Rule 80, Code of 1907.

[18] Chancery Rules 78, 74, Code of 1907; Harper v. Raisin Fert. Co., 48 So. Rep. 589.

CHAPTER XVII.

Pleas.

§ 452. Definition and proper use of pleas.—"A defendant who has a single affirmative defense which will be decisive of the controversy can avoid giving discovery in aid of the case stated in the bill by setting up his defense by a plea; and this is the object of pleading instead of answering."[1] Such is the concise language used by Professor Langdell to define pleas and to point out their proper use; and there seems to be nothing to add to it. As the name implies, pleas were introduced from the common law, and are founded upon the theory of common law pleading that whatever is not denied is admitted. Discovery by way of answer to the allegations of the bill is therefore unnecessary when pleas are filed; since the procedure amounts to confession and avoidance.[2] The bill, to the extent that it is covered by the plea, is thereby confessed; and if the defense set up by the plea is found to be good, the only matter at issue is the truth of the plea; and the plaintiff or the defendant wins the suit according to whether the defendant fails or succeeds in establishing the truth of his plea.[3]

§ 453. Pleas in Alabama.—In Alabama chancery practice pleas have not been extensively used, partly because their value as above pointed out has been lost sight of, and partly because the early statute, already referred to, which gave rise to the incorporation of all defenses in the answer,[4] long kept the effect of such pleas uncertain, and probably on that account reacted against the use of separate pleas. By a recent

[1] Langdell, Eq. Pl. § 98. Compare Scharfenberg v. Town of New Decatur, 47 So. Rep. 95.

[2] Langdell, Eq. Pl. §§ 98, 102.

[3] Langdell, Eq. Pl. § 98; 2 Daniell Ch. Pr. 798; Story, Eq. Pl. § 697; Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178; Tyson v. Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder, 133 Ala. 620; Holloway v. So. Bldg. & Loan Asso., 136 Ala. 160.

[4] See §§ 25 and 26, ante.

decision[5] the same effect to terminate a cause was given to pleas incorporated in answers which always followed the plea as a separate defense; and pleas incorporated in answers have been quite frequently employed since that time. But by the Code of 1907, the statute under which the incorporation of pleas in answers had been authorized since the Code of 1852, was materially changed;[6] and so the practice governing pleas in chancery is more uncertain now than ever before. As the English chancery practice obtains in Alabama, however, 'in all cases where the statutes of this state, the decisions of the Supreme Court of Alabama, or the rules prescribed by it do not apply'[7] the English practice upon pleas must be our basis for interpreting the new language of the Code and clearing up uncertainties in the decisions; and as there have been comparatively few Alabama Supreme Court decisions upon pleas, it seems best to take a brief survey of the English practice upon pleas, noting the few Alabama decisions applying, and then to construe our peculiar statute upon the subject. Only enough of the English principles will be given, however, to give the reader a general knowledge of the subject. For details he must refer at once to Daniell or Story, since he will there find the principles and practice discussed at full length, with the necessary English or American decisions to sustain the conclusions. To elaborate the matter here would be an imposition.[8]

§ 454. The different kinds of pleas.—Pleas are directed either against discovery or against relief, just as we found that demurrers were directed;[9] and pleas to relief are classified as, 1, pleas to the jurisdiction; 2, pleas to the person of the plaintiff or defendant; and 3, pleas in bar of the suit.

Mr. Daniell says[10] "It appears to be the opinion of Mr. Beames, that pleas in equity are primarily divisible into pleas

[5] Tyson v. Decatur Land Co., 121 Ala. 414.

[6] Sec. 3115, Code of 1907.

[7] Chancery Rule 7, Code of 1907.

[8] Daniell devotes 130 pages of Volume II. of Chancery Practice to pleas, being Chapter XIV. pp. 677-806. Story devotes 136 pages of his Equity Pleading to pleas, being chapters XIII. and XIV. §§ 647-815.

[9] 2 Daniell Ch. Pr. 713; See § 414, ante.

[10] 2 Daniell Ch. Pr. 713.

in abatement and pleas in bar. He observes, that, 'in a work on pleading at law, pleas are thus described: "pleas are of two sorts—in abatement and in bar; the former question the propriety of the remedy, or the legal sufficiency of the process, rather than deny the cause of action; the latter dispute the very cause of action itself;" and that it is impossible to read this passage without perceiving how perfectly applicable it is to pleas in equity, and how strongly appropriate, as making the distinction between pleas to the jurisdiction, to the person, and the bill, and pleas in bar; the three former classes, while they question the propriety of the particular remedy or of the suit, tacitly concede the existence of a cause of suit; but the latter dispute the very cause of the suit itself.' "

In this opinion Mr. Daniell concurs, but continues. "It is, however, to be observed, that it nowhere appears that any practical consequence results, in equity, from the distinction between pleas in abatement and pleas in bar."

Chief Justice Brickell recognized the essential character of pleas to the territorial jurisdiction of a court as pleas in abatement; for he twice said: "If the fact does not appear on the face of the bill, a plea in the nature of a plea in abatement is the appropriate mode of presenting the objection."[11]

§ 455. Filing more pleas than one.—The principal object of filing a plea instead of a full answer being to narrow down the cause to a single issue which the defendant believes will defeat the suit, it is usually improper to present two of them; because if either is known to be good, and is certain of proof, the other is unnecessary labor, and if either should turn out to be untrue, as we have seen, the defendant would lose the whole suit.[12] Moreover the English practice forbad the filing of more pleas than one except by the court's express consent.[13] There were instances, however, in which it was appropriate to file more than one plea; as where the bill was framed in a double aspect, or in the alternative, and one plea

[11] Harwell v. Lehman, Durr & Co., 72 Ala. 344; Campbell v. Crawford, 63 Ala. 392.

[12] See § 452, ante.

[13] 2 Daniell Ch. Pr. 683; Story, Eq. Pl. § 657; Langdell Eq. Pl. § 98.

might be directed against one phase of the case, while another plea could be directed against the other.[14] And so it might often be advisable to test the jurisdiction of the court by a plea in the nature of a plea in abatement, and at the same time to file a plea in bar of the suit. In Alabama, however, the practice has been allowed of filing innumerable pleas, just as at law, without either the court or the plaintiff raising objection. And yet no instance seems to have risen of the plaintiff claiming the suit because of the defendant's having failed to prove all of them. It is true that the pleas in each instance were incorporated in the answers;[15] but the practice would seem to be relieved of no ill consequences on that account; for it looks as if the defendant should be held to lose the suit from failure to prove a plea incorporated in the answer, just as he has been allowed to win it by proving such a plea.[16]

§ 456. Pleas must not be double.—But while it may be allowed under certain circumstances to file more than one plea, it is never allowable to incorporate more than one defense in a single plea. The rule is invariable that a plea must not be double, because the essential purpose of a plea is to reduce the suit to a single issue.[17] It will be observed, however, that this does not prevent many facts being alleged in the plea, if they all combine into one defense; for singleness of issue must not be understood to mean an issue upon a single fact.[18]

§ 457. Pleas to part of bill.—It is also allowable to draw a plea so that it will stand as a defense to part of the bill only, an answer being filed to the remainder; exactly as a demurrer may be presented to a part of the bill together with an answer

[14] Ibid. And compare Supreme Lodge &c. v. Wing, 131 Ala. 395.

[15] Glaser v. Meyrovitz, 119 Ala. 152; Freeman v. Pullen, 119 Ala. 235; Tyson v. The Decatur Land Co., 121 Ala. 414. Many other records in the Supreme Court might be cited.

[16] Tyson v. The Decatur Land Co., 121 Ala. 414.

[17] First National Bank v. Tyson, 133 Ala. 459; 2 Daniell Ch. Pr. 682; Story, Eq. Pl. § 652, et seq.

[18] Story, Eq. Pl. § 652; 2 Daniell Ch. Pr. 682; Town of New Decatur v. Scharfenberg, 147 Ala. 367.

to the remainder. And in this way it is allowable also to file more pleas than one, each plea being presented to a different part of the bill.[19]

§ 458. When plea overruled by answer.—But care must always be taken to define clearly the part of the bill to which such a plea is to apply; for if an answer intended to cover parts of the bill not defended by the plea, may be taken to extend to the part to which the plea is filed, the answer will overrule the plea and upon being tested it may be held bad.[20] And "the reason of this is that pleas are to be put in ante litem contestatam; because they are pleas only why the defendant should not answer; and therefore if he does answer to anything to which he may plead, he overrules his plea," for he waives his objection to answering.[21] It is not certain, however, that an answer has that effect now in Alabama; for notwithstanding the incongruity of a contrary holding, a rule of English Chancery adopted in 1841, and therefore probably law with us,[22] provided that "no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be overruled by such demurrer or plea."[23] The defendant has also the right by statute in Alabama of incorporating a plea with his answer, and of course under such circumstances the answer will not overrule it.[24] But this statutory proceeding is clearly defined, as we shall see later, is permissive merely,[25] and is not the same thing as filing a plea and an answer separately but at the same time, or as filing the answer subsequently but before the plea has been ruled upon.

§ 459. Pleas good in part.—In one important respect pleas in English practice were treated differently from demurrers. A demurrer, as we have seen, would not be allowed as a defense to less of the bill than that to which it was offered, since

[19] 2 Daniell Ch. Pr. 685.

[20] Story, Eq. Pl. § 693; 2 Daniell Ch. Pr. 694.

[21] Story, Eq. Pl. § 688.

[22] Chancery Rule 7, Code of 1907.

[23] 37th Order of May 1841. See 1 Daniell Ch. Pr. 651; 2 idem. 695.

[24] Sec. 3115, Code of 1907.

[25] Tyson v. The Decatur Land Co., 121 Ala. 414, 418.

it was offered as a ground why the defendant should go no further.[26] But a plea, being in its nature a short affirmative answer,[27] was allowed upon argument as a defense to so much of the bill as it might be applicable, apparently even though it was offered as a plea to the whole bill.[28] This is probably contrary to the holdings in a good many decisions of the chancellors throughout Alabama which were not taken to the Supreme Court, but nevertheless it seems to be law. The only qualification would seem to be that in order for a plea presented to the whole bill to stand good to a part of the bill only, the bill must be capable of severance into parts, so that the part to which the plea would be good, may be taken out, and still leave a basis for the suit. Whereas if the bill cannot be severed, but constitutes one inseparable statement of the cause of action, and the plea fails to cover all the allegations of the bill, although it purports to do so, of course the plea will be bad.

The latter situation was that presented by the bill in Supreme Lodge Knights and Ladies of Honor v. Wing,[29] in which case Mr. Justice Tyson held that a plea was bad because it did not extend to or cover the whole bill. The bill alleged that a certain set of by-laws of the association were not binding upon the plaintiff, so as to prevent her from being a beneficiary of the association; but that if they were, the plaintiff had an excuse for not complying with them. The plea merely set up the by-laws whose efficaciousness the bill denied. The bill itself having charged the existence of the by-laws, and then having proceeded in both its phases to avoid them, it is apparent that the plea was not good against either phase. But it is also apparent that both phases anticipated the by-laws as a defense, so that they could not be set up against one rather than the other. And the language of the court that the plea "does not extend to or cover the whole bill and is bad," must not be misunderstood; for it is

[26] 1 Daniell Ch. Pr. 651. And see §§ 430, 431, ante.

[27] Langdell Eq. Pl. § 92.

[28] 2 Daniell Ch. Pr. 686; Story, Eq. Pl. § 692. And see the language of Chancellor Kent in French v. Shotwell, 5 Johnson's Chancery Reports, 555.

[29] 131 Ala. 395.

exactly the language used by Mr. Justice Story in discussing a plea to an indivisible bill in paragraph 693 of his work on equity pleading, when in paragraph 692 he pointed out that "if a plea covers too much, the court will allow it to stand for the part which it properly covers."

§ 460. Anomalous pleas.—The situation in Supreme Lodge Knights and Ladies of Honor v. Wing, as just described, was apparently one in which the defendant should have filed an anomalous plea. Where the plaintiff anticipates the defense to be set up to the bill and charges his facts in avoidance of it, the defendant must add to his plea a denial of the averments in the bill which avoid it; else he will be put in the position of admitting them; and such a plea consisting of an affirmative defense coupled with a denial of certain charges in the bill, is called an anomalous plea, because it is partly affirmative and partly negative.[30]

§ 461. Negative pleas.—As a result of the introduction of anomalous pleas, the occasion for negative pleas in time became apparent. "It was not perceived at first that anomalous pleas involved the admission of pure negative pleas. It would often happen, however, that a defendant would have no affirmative defense to a bill, and yet the bill could not be supported because of the falsity of some material allegation contained in it; and, if the defendant could deny this false allegation by a negative plea, he would thereby avoid giving discovery as to all other parts of the bill. At length, therefore, the experiment of setting up such a plea was tried; and though unsuccessful at first, it prevailed in the end, and negative pleas became fully established."[31] Purely negative pleas are confined, however, to suits in which the plaintiff's bill sets forth a title or right the mere denial of which presents the issue determining the cause. "But if the bill states or charges facts by way of evidence of the plaintiff's right," the negative plea should be supported by an answer.[32]

[30] Langdell Eq. Pl. § 101; Story, Eq. Pl. § 657. Daniell does not name such pleas, but gives examples of them in 2 Daniell Ch. Pr. 688, et seq.

[31] Langdell Eq. Pl. § 102.

[32] 2 Daniell Ch. Pr. 692; Story, Eq. Pl. § 668.

§ 462. Answers in support of pleas: when necessary.—An underlying principle of chancery procedure being the right of the plaintiff to the defendant's answer under oath to aid in the proof of the bill, no plea whether negative or anomalous, will be good which deprives the plaintiff of the defendant's testimony as to matters in the bill of which the defendant may have knowledge. The plaintiff has the right to the defendant's answer, even for the purpose of disproving the plea, "as to all matters of fact, which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not by his form of pleading admit."[33] "The defendant, therefore, incorporates an answer with his plea; and then the answer is said to support the plea. Such an answer, it will be observed, contains discovery only, and it is called an answer in support of a plea to distinguish it from the case where a defendant defends by answer as to part of the bill, and by plea as to part."[34]

Daniell has classified the instances in which it is necessary that a plea be supported by an answer,[35] and has also discussed very fully the whole subject of pleas supported by answers, pointing out each danger and each requirement with his usual thoroughness. The practice of supporting pleas by answer has never been discussed in the Supreme Court of Alabama: so it is best to refer the student who desires to pursue it to the illuminating pages of Daniell himself. But in passing it is well to suggest that the necessity of supporting a plea with an answer would appear to be limited to suits in which the oath of the defendant to his answer has not been waived in the bill. As the plaintiff in Alabama cannot except to the sufficiency of an answer to which the oath has been waived,[36] he would seem to have no right to object to a plea being filed without being supported by any answer at all.

§ 463. Testing the sufficiency of pleas.—By the English practice when a plea was filed to a bill the plaintiff was required to decide first whether the plea offered a good defense;

[33] Story, Eq. Pl. § 672.
[34] Langdell, Eq. Pl. § 100.
[35] 2 Daniell Ch. Pr. 692.
[36] Chancery Rule 34, Code of 1907.

and if he believed it did not, he had the plea set down for argument upon its sufficiency.[37] The defendant, too, could have the plea set down for argument; but it was against his interest to do so; for if the plaintiff failed to set the plea down, or failed in lieu thereof to take steps to amend the bill, at the expiration of three weeks the defendant could have the bill dismissed as of course.[38]

In Alabama pleas are tested in the same way, whether they are filed alone or incorporated in answers as allowed by our statute;[39] Although when their sufficiency is brought before the court by demurrer or motion to strike, consideration of the pleas will not be refused because the question has been raised by an incorrect method.[40]

§ 464. Disposition of pleas by the court.—When the sufficiency of a plea has been argued, the court usually either overrules the plea and requires the defendant to answer,[41] or allows the plea as a good defense to so much of the bill as it covers.[42] But if the plea appears to the court to be good, but likely to be avoided by the proof of matter charged in the bill, the court may direct that the benefit of it shall be saved to the defendant at the hearing upon bill, answer, and proof,[43] and if the plea is good to a part of the bill, but not to as much of the bill as it purports to cover, the court orders it to stand for an answer to that part of the bill to which it is good.[44] Instances of the latter two orders are rare, however, so we may proceed to learn what is to be done when a plea has been allowed as a good defense to that part of the bill to which it is offered.

[37] 2 Daniell Ch. Pr. 793; Story, Eq. Pl. § 697.

[38] 2 Daniell Ch. Pr. 793, 794, 795.

[39] Glaser v. Meyrovitz, 119 Ala. 152; Tyson v. The Decatur Land Co., 121 Ala. 414; Supreme Lodge &c. v. Wing, 131 Ala. 395; Breeding v. Grantland, 135 Ala. 497; Town of New Decatur v. Schafenberg, 147 Ala. 367.

[40] Freeman v. Pullen, 119 Ala. 235; Adair v. Feder, 133 Ala. 620; Breeding v. Grantland, 135 Ala. 497.

[41] 2 Daniell Ch. Pr. 802; Supreme Lodge Knights &c. v. Wing, 131 Ala. 395.

[42] 2 Daniell Ch. Pr. 797.

[43] 2 Daniell Ch. Pr. 800; Story, Eq. Pl. §§ 697, 698.

[44] 2 Daniell Ch. Pr. 801; Story, Eq. Pl. § 699.

§ 465. Allowance of plea compels issue or amendment of bill.—Since a plea involves the common law admission of the allegations in the bill, or of that part of the bill to which the plea is filed, when a plea is allowed by the court to be good in the form in which it is offered, there is nothing left to be decided but the question of the truth of the plea. Of course the plaintiff may have additional grounds for the suit not already presented in the bill; and if he has, he should bring them forward by amendment to the bill, so as to negative or avoid the effect of the plea,[45] just as he may amend the bill in order to avoid the effect of an answer. But if he does not amend his bill, he must deny the truth of the plea or abandon the suit. "The truth of the plea is the only subject of question remaining, so far as the plea extends."[46] If the plea was set up to the whole bill, and so allowed, then the whole bill depends upon the falsity of the plea; and if the plea was set up to a part of the bill, and so allowed, then that part of the bill depends upon the falsity of the plea.

§ 466. Replication to plea and its effect.—By the English practice the next step for the plaintiff was to reply to the plea; which was a simple denial of it, or an acceptance of the issue, if the plea was negative.[47] But in Alabama, by analogy to the statute dispensing with the replication to an answer,[48] it is held that no replication is necessary to a plea, the issue being made up silently between the parties as a result of the taking of testimony. And this is held to be true even though the plea be incorporated in the answer.[49]

Of course it is not necessary for the plaintiff to test the sufciency of a plea before taking issue upon it. Certain pleas were never argued because their sufficiency was apparent,

[45] Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178; Bronson v. Rosenheim, 149 Ala. 112; Scharfenberg v. Town of New Decatur, 47 So. Rep. 95.

[46] Story, Eq. Pl. § 697; Langdell, Eq. Pl. § 98; 2 Daniell Ch. Pr. 797.

[47] Langdell, Eq. Pl. § 98; 2 Daniell Ch. Pr. 795; Story, Eq. Pl. § 697.

[48] Sec. 3122, Code of 1907.

[49] Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178; Tyson v. The Decatur Land Co., 121 Ala. 414; Adair v. Feder, 133 Ala. 620; Sellers v. Farmer, 147 Ala. 446; Scharfenberg v. Town of New Decatur, 47 So. Rep. 95.

and the court might proceed at once to determine their truth. Such were pleas of a former suit pending, of a decree signed,[50] and under certain circumstances, pleas setting up the infancy or the insanity of parties.

But without regard to the sufficiency of a plea, by the English practice, "if the plaintiff reply, he thereby makes as full an admission of its validity as if it had been allowed upon argument; so that if the defendant at the hearing proves his plea to be true, the bill must be dismissed; therefore where a defendant, in a plea of purchase for a valuable consideration, omitted to deny notice and the plaintiff replied to it, and the defendant at the hearing proved the purchase for a valuable consideration, it was held that the bill ought to be dismissed; for it was the plaintiff's own fault that he had not set the plea down for argument, when it would have been overruled."[51]

In Alabama also taking issue upon a plea has always involved the admission of its sufficiency; and that even though the plea was incorporated in an answer.[52] But the Code of 1907 contains a new provision which undoubtedly prevents such an admission of the sufficiency of the plea by taking issue when the plea is incorporated in the answer, and seems to do so even though the plea be filed alone.

§ 467. New provision of the Code.—Section 3115 of the Code of 1907 reiterating from former Codes that "A defendant may incorporate all matters of defense in his answer, and is not required to plead specially in any case," continues the sentence as follows, "but shall not take or have any advantage by pleading or proving an immaterial, irrelevant, insufficient, or untrue plea, and the complainant is not required to test the sufficiency of any such plea, or to move to strike it, and if his bill contains equity and is proved, he shall have the appropriate relief, notwithstanding any such special plea may have been pleaded and proved."

[50] 2 Daniell Ch. Pr. 793.

[51] 2 Daniell Ch. Pr. 795; Story, Eq. Pl. § 697.

[52] Tyson v. The Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder 133 Ala. 620. These decisions overruled Jackson v. Knox, 119 Ala. 320.

As destructive of the effect of taking issue as amounting to the admission of the sufficiency of pleas incorporated in the answer, this new provision is very salutory; for some injustice had been done under the former practice by the dismissal of bills upon the proof of immaterial pleas inadvertently put in issue along with answers in which they were incorporated.[53]

But if the new provision applies to pleas filed separately as well as those incorporated in answers, its value to that extent is doubtful; for it would seem to render the use of pleas as a defense more hazardous. If a separate plea need not be tested to limit its effect upon the bill, the plaintiff should not, and probably will not ever set it down for argument upon its sufficiency, but will take issue upon it at once. And then even though the plea be proven, the defendant gains nothing if the plea is finally held immaterial; whereas he still loses the case if the plea be not proven, whether the plea be immaterial or good. On the other hand, if the sufficiency of the plea must be tested, and the plea is held bad, the defendant has the opportunity to answer and set up other defenses he may have to the suit.

Of course this situation is brought about also in respect of pleas incorporated in answers; and renders the presenting of them hereafter very dangerous But to abolish them was no loss; for except as tricks to mislead the unwary, they were of little value anyway.

It is true that the hazard attendant upon the new statute, if applicable to separate pleas, is not as great as it seems; for a careful pleader even under the English practice would never file a plea if he had any doubt of his power to prove it. He would risk its sufficiency rather than its truth as a matter of

[53] Tyson v. The Decatur Land Co., 121 Ala. 414; Holloway v. So. Bldg. & Loan Assn., 136 Ala. 160. The danger of taking issue unintentionally upon a plea incorporated in the answer had been reduced as far as possible by decisions subsequent to Tyson v. The Decatur Land Co. holding that for a plea incorporated in the answer to stand as a plea, it must be distinct in itself, so as to leave no doubt of its identity as such. Stein v. McGrath, 128 Ala. 175; Mylin v. King, 139 Ala. 319.

defense. And his policy in this respect would not change under the new statute. But unless the plea was a matter of record, he might be mistaken in his confidence of its truth; and before the new statute, the defendant could lose the case on the failure to prove good pleas only, whereas if the statute applies to separate pleas, he can now lose them on the failure to prove good pleas and bad pleas alike. It is to be hoped therefore that the Supreme Court will hold section 3115 of the Code of 1907 not applicable to pleas when not incorporated in answers.

§ 468. Proof of plea.—When issue has been taken upon a plea, and the cause has been thereby reduced to the truth of the affirmative matter set up in it, the burden is upon the defendant to establish it. If he succeeds the suit is barred, as far as the plea extends; under the English practice, and in Alabama prior to the Code of 1907, even though the plea was not good either in form or substance;[54] but since the enactment of section 3115 of the Code of 1907, only when the court finds the plea sufficient as well as true. If that section does not apply to separate pleas, then the English practice still obtains as to them, and when issue is taken upon them and they are sustained by the evidence, the suit is over so far as they extend, whether they are sufficient or not.

If the plea is not sustained by the proof after issue has been taken upon it, then whether it would have been held a good plea or not if tested for its sufficiency, the plaintiff is entitled to a decree upon so much of the bill as was resisted by the plea. And if the discovery which would have been given by a full answer is of any value to the plaintiff, he is not deprived of it by the fact of having won the suit upon the issue of a plea; for the court will order the defendant to be examined upon interrogatories.[55]

If the plea is a negative plea or an anomalous plea, the

[54] 2 Daniell Ch. Pr. 798; Story, Eq. Pl. § 697; Tyson v. The Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder, 133 Ala. 620; Holloway v. So. Bldg. & Loan Assn., 136 Ala. 160.

[55] 2 Daniell Ch. Pr. 798.

burden of the entire issue is not thrown upon the defendant merely because it is raised by a plea. The defendant must prove the affirmative matter of the plea, but the plaintiff must prove the affirmative matter of the bill denied by the plea.[56] Thus where the plea sets up the defense of a purchase for a value without notice, the bill having anticipated the defense and charged notice, the defendant is required to prove only a purchase for value, and the plaintiff is required to prove that the defendant had notice of the plaintiff's equity as charged in the bill.[57]

§ 469. Pleas incorporated in answers.—As pointed out already several times in this chapter, the right has long existed in Alabama by statute to incorporate pleas in answers just as if filed alone. The section of the Code of 1907 embodying the privilege[58] contains the new matter already discussed,[59] but the privilege as it existed heretofore has not been changed since the Code of 1852:—"A defendant may incorporate all matters of defense in his answer, and is not required to plead specially in any case."[60] Prior to 1852 the incorporation of the plea in the answer was the only method of filing it;[61] but since then, under the statute above quoted, the incorporation of the plea has been a mere privilege.[62]

But the incorporation of the plea in an answer does not mean that a part of the answer itself may be taken as a plea, with the attendant benefits and liabilities. The plea must be separated from the answer sufficiently to be identified, al-

[56] Langdell, Eq. Pl. §§ 111, 113.

[57] Hightower v. Rigsby, 56 Ala. 126; Alston v. Marshall, 112 Ala. 638; Hanchey v. Hurley, 129 Ala. 306. In the last case it was held unnecessary for the plaintiff to charge notice in his bill. This is stated by Tyson, J., to be the opinion of the majority of the court in Hanchey v. Hurley, although he himself held the contrary. But in Bank of Luverne v. Bham. Fertilizer Co., 143 Ala. 153, a bill failing to charge notice was held to be without equity. A plea denying notice was held good in McKee v. West, 141 Ala. 531.

[58] Sec. 3115, Code of 1907

[59] See § 467, supra

[60] Sec. 699, Code of 1896; Sec. 2899, Code of 1852. It appears in all intervening Codes.

[61] See § 25, et seq. ante.

[62] Tyson v. The Decatur Land Co., 121 Ala. 414; Stein v. McGrath, 128 Ala. 175.

though covered by the same signature or oath. "By so doing the attention of the party is called to it, when he may take issue, or test its sufficiency by other proper pleading."[63]

The effect of a plea incorporated in an answer up to the Code of 1907 was held to be the same as when filed alone;[64] and is still the same, unless the new matter in section 3115 of the Code of 1907 is held inapplicable to pleas filed separately. But notwithstanding the effect being the same, it is believed that the incorporation of a plea in the answer is poor policy for the defendant.

An answer, as we shall see, consists of two main portions, the answer proper to the allegations of the bill, and the presentation of the defendant's defenses to the suit, which are usually several. A plea, on the other hand, consists of one defense, which the defendant believes will bar the suit and obviate the necessity of answering. What therefore has the defendant to gain by offering a plea and going through the labor of answering at the same time? If he is willing to answer, it would seem foolish to limit himself to one defense when he is at liberty to rely upon several; and while he may present them all anyway, the one he points out to stand as a plea also may be the one he may fail to prove, and thereby lose the case.[65] It may be thought that some advantage is obtained from incorporating a plea in the answer in limiting the plaintiff's amendments to the bill, and interlocutory appeals. But if the plea is tested for its sufficiency, the plaintiff has his attention called to the necessity of amendment by the decree upon that point; and if the defendant gains nothing from incorporating his plea by the prevention of an interlocutory appeal, it is apparent that he had better file no plea at all.

§ 470. Pleas to amendments.—Frequently the plaintiff amends his bill after a plea or an answer has been filed. By the English practice, the defendant may then file a plea to

[63] Stein v. McGrath, 128 Ala. 175; Mylin v. King, 139 Ala. 319.

[64] Tyson v. The Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder, 133 Ala. 620; Holloway v. So. Building and Loan Assn., 136 Ala. 160. And see § 466, supra.

[65] See § 468, supra.

the bill as amended; but the answer, which was usually under oath, might be read to disprove any matter afterwards contradicted in the plea.[66]

By a new section of the Code of 1907, all pleadings filed after amendment of the bill when an answer is already on file, "shall only be allowed as amendments to the defensive pleadings already in the cause, and not as originals, and the cause shall be heard as the whole after being once at issue."[67] But it does not appear that this has any effect upon pleas filed to amendments, other than to incorporate them in prior answers.

The same section, it must be noted, gives the plaintiff the peculiar privilege, when he has once amended his bill to meet an answer filed, to require the defendant to answer again immediately, instead of filing a demurrer or a plea to the bill as amended.

§ 471. When pleas should be sworn to.—Under the English practice it was necessary for the defendant to swear to any plea he might file whenever the plea set up facts requiring to be proved by testimony at the hearing. But even though the oath to the answer is not waived, this is not necessary in Alabama.[68]

But regardless of the defendant's oath being waived in the bill, there are some pleas which our decisions hold can be set up only under oath. Pleas denying the execution of a written instrument made the basis of the suit, must be sworn to, section 3967 of the Code, which provides that an instrument purporting to be signed by the defendant, his agent, partner, or attorney must be received in evidence without proof of its execution unless the fact is denied under oath, being held applicable to suits in chancery as well as at law.[69] And because

[66] II Daniell Ch. Pr. 780.

[67] Sec. 3128, Code of 1907. This section also provides "The defendant may incorporate a plea or demurrer in his answer." As this might already be done under § 3115 and the decisions upon it, doubtless this addition to § 3128 refers to answers to amendments.

[68] II Daniell Ch. Pr. 786; Town of New Decatur v. Scharfenberg, 147 Ala. 367.

[69] Smith v. Hills-Carver Co., 107 Ala. 272; Hooper v. Strahan, 71 Ala. 75; Bonner v. Young, 68 Ala. 35.

of the same section a plea denying the plaintiff's ownership of a chose in action and his right to sue upon it in his own name instead or in that of his assignor, must be sworn to.[70]

So too that section of the Code is applicable to chancery as well as to law which provides that the incorporation of a corporation when a party to a suit, and the existence of a partnership and the individuals composing it when made parties to a suit, may not be denied except under oath.[71] And no doubt also a plea denying the consideration of a written instrument made the basis of a suit must be sworn to in chancery as well as at law.[72]

§ 472. Special defenses set up by plea.—Besides the special defenses just referred to which may be set up by sworn pleas only, there are other defenses which require to be set up by plea or answer in Alabama rather than by demurrer, and which from their nature are well adapted to be set up by separate plea. Statutes of limitation, unless the bar is apparent upon the face of the bill, cannot be set up by demurrer; and since the bar may be waived by the defendant, it is more appropriate in all cases to set them up by plea.[73] And when a statute of

[70] Henderson v. Brown, 125 Ala. 566. This decision overrules although not referring to Clements v. Motley, 120 Ala. 575, and McGhee v. Importers' and Traders' Nat. Bank, 93 Ala. 192; but as the section of the Code is the same as that requiring a plea denying the execution of the instrument to be under oath, the decisions holding that requirement applicable to chancery are really decisions that the whole section is applicable to chancery; and may be cited in support of Henderson v. Brown.

[71] Sec. 3969, Code of 1907; Smith v. Hills-Carver Co., 107 Ala. 272; Davis v. Walker, 125 Ala. 325, holds that the existence of a partnership may not be denied except under oath; and while it is a decision in a law case, the same requirement must apply to equity, because the requirement is a part of the same section as that affecting corporations.

It is also held in law cases that a plea denying that one partner had authority to bind another by an instrument executed in the firm name, amounts to a plea denying the execution of the instrument, and must be sworn to. Fowlkes v. Baldwin, 2 Ala. 705; Goether Weil & Co. v. Head & Co., 70 Ala. 532.

[72] Sec. 3966, Code of 1907.

[73] Espy v. Comer, 76 Ala. 501; Thompson v. Parker, 68 Ala. 387.

limitation is set up by plea, unless the nature of the claim is averred in the bill, the plea must aver the nature of the claim, and then state that it is barred by the particular statute of limitation set up.[74] In short, "a plea of a statute of limitations must contain sufficient affirmative averments to bring the cause within the statute pleaded."[75]

The statute of frauds also is usually set up by plea; because if the transaction sued on is voidable under it, the bill would not likely show the defect.[76] If the bill avers a contract to be oral, however, when it should be in writing, or if it sets forth a writing defective on its face, the statute of frauds may be raised by demurrer; although even then it seems possible to raise it by plea as being an optional defense.[77]

§ 473. Time for filing pleas.—As to the time for filing pleas, little need be said. If the plea is the first defense set up, of course it must be filed within thirty days after service of process or perfection of publication.[78] But if the plea is presented as a second defense, a demurrer having been overruled, the decree of the chancellor overruling the demurrer usually prescribes the time within which the next pleading must be filed.

Pleas may be incorporated in answers already filed, by making them amendments to the answers.[79] But after submission upon bill answer and proof it is error to allow a plea to be incorporated in the answer without first setting aside the submission.[80]

§ 474. Amendment of pleas.—By the English practice the only amendments allowed to pleas were mere formal amendents.[81] And while our statute of amendments is broad enough to warrant amendment to pleas,[82] it is probable that the amendments allowed would be formal only.

[74] Battle v. Reid, 68 Ala. 149.

[75] 2 Daniell Ch. Pr. 746.

[76] Martin v. Wharton, 38 Ala. 637. And see § 443, ante, and cases cited in footnote (81) thereunder.

[77] Phillips v. Adams, 70 Ala. 373.

[78] Sec. 3107, Code of 1907.

[79] Reese v. Bromberg, 88 Ala. 619, and Harland v. Person, 93 Ala. 273, decisions allowing the incorporation of a demurrer under the same statute.

[80] Wilkinson v. Buster, 115 Ala. 578.

[81] 2 Daniell Ch. Pr. 804.

[82] Sec. 3126, Code of 1907.

§ 475. Time for hearings upon pleas.—The rules already referred to as providing with respect to the hearing of demurrers apply also to hearings upon the sufficiency of pleas,[83] except Chancery Rule 73, providing that a demurrer shall be considered along with any exceptions to the bill, and Rule 75, prescribing the procedure at hearings, which fails to provide as to pleas. It would seem, too, from Rule 72 that a plea need not be heard at the first calling of the cause unless its truth is admitted. The hearing of a cause submitted upon the truth of a plea is not specially provided for differently from hearings upon bill, answer, and proofs.

The procedure at the hearing upon the sufficiency of a plea is the same as that at the hearing upon a demurrer, the plaintiff having the opening;[84] but at the hearing upon the truth of the plea, the truth of the bill being admitted, the defendant should open and close, since the burden is upon him.[85] But if the plea be negative, the burden is upon the plaintiff, and he should open and close.

[83] See § 449, ante.

[84] 2 Daniell Ch. Pr. 796; 1 Daniell Ch. Pr. 667.

[85] Langdell Eq. Pl. § 113.

CHAPTER XVIII.

Interlocutory Decrees and Appeals.

§ 476. What are interlocutory decrees?—The question what is an interlocutory decree has not received as much direct discussion in Alabama as the question what is a final decree, for the reason that errors which may be made the basis for such appeals as are allowed from interlocutory decrees, may be assigned upon appeal from a final decree rendered afterwards in the cause.[1] But in determining what is a final decree, the Supreme Court has made clear by exclusion what decrees are interlocutory, and the definition of one may be given as a short cut to arrive at the other.

The broad conclusion to be deduced from a long line of decisions is that a decree is final which settles the equities of the bill;[2] and that "the finality of a decree is not determined by the stage of the suit at the time it is rendered, but upon whether it concludes a party in imposing on him a liability or in depriving him of a right."[3] All other decrees then, may be regarded as interlocutory.[4]

[1] Sec. 2838, Code of 1907; Nelms v. McGraw, 93 Ala. 245; Wadsworth v. Goree, 96 Ala. 227.

[2] Woodruff v. Smith, 127 Ala. 65; Jones v. Wilson, 54 Ala. 50; Broughton v. Wimberly, 65 Ala. 549; Walker v. Crawford, 70 Ala. 567; Cochran v. Miller, 74 Ala. 50; Adams v. Sayre, 76 Ala. 509.

[3] Per Sharpe, J., in Alexander v. Bates, 127 Ala. 328, 342. And see §§ 421, 422, ante.

[4] In drawing the distinction between interlocutory decrees and final decrees it is impossible to rely much upon the English precedents, because the present conception of a final decree in Alabama is at variance with the books. Our conception has doubtless developed along the line of a practical construction of the statutes regulating appeals; because it was wiser to allow an appeal immediately after a decree settling the equities in a cause than to postpone reviewing the decision of the chancellor until all the final orders incident to a decree adjudging certain equities should have been made. Daniell pursues the opposite method to that adopted in the text. He says a decree "is either interlocutory or final; an interlocutory decree is when the consideration of the particular question to be determined, or of further directions generally, is reserved till a further hearing;

§ 477. Decree may be partly interlocutory and partly final.—But it must not be presumed that the line between interlocutory decrees and final decrees can be clearly drawn. The two classes are not co-exclusive; for sometimes a decree may be both interlocutory and final at the same time. "If it settle all the equities between the parties, it is, to that extent final. If it is necessary to take an account, or other proceedings must be had to carry it into effect, to this last named extent it is interlocutory, and may be moulded, modified, or altered by the chancellor, as any other interlocutory decree may be. The principles of relief cannot be altered, for they are final. Directions for carrying the decree into effect may be modified, for they are interlocutory."[5] Such a decree is a decree of foreclosure and sale; and it is said to be "partly final, and partly interlocutory."[6]

§ 478. Character of decree sometimes determined by court.—Again a decree rendered at an intermediate stage of the cause, and which does not necessarily dispose of all the equities involved in the suit, sometimes may be made a final decree instead of an interlocutory decree, at the discretion of the chancellor rendering it. Thus every demurrer, unless it be a demurrer for want of equity under the Code of 1907,[7] contemplates the allowance of leave to the plaintiff to amend the bill, if he is able to do so; and therefore the decree merely sustaining the demurrer is essentially interlocutory.[8] But if the chancellor incorporates in the decree a dismissal of the

and the further hearing is termed a hearing upon further directions, or upon the equity reserved." 2 Daniell Ch. Pr. 1192. He then says, "When a decree does not reserve the consideration of the points of equity, arising upon the determination of the legal rights of the parties, or of the further directions consequent upon the master's report, or of the costs of the suit, it is said to be a final decree." Idem, 1199. It is apparent that the two definitions do not by any means agree with the meaning of the terms under the Alabama decisions.

[5] Per Stone, J., in Cochran v. Miller, 74 Ala. 50, 63, quoted by Somerville, J., in Adams v. Sayre, 76 Ala. 509, 517.

[6] Per Brickell, C. J., in Malone v. Marriott, 64 Ala. 486, quoted by Stone, J., in Cochran v. Miller, 74 Ala. 50, 63.

[7] See § 419, et seq., ante.

[8] Rose v. Gibson, 71 Ala. 35.

bill, the decree is final, whether the dismissal without allowing time for an amendment is error or not.[9] In that case, however, it is the dismissal of the cause which makes the decree final, and not the sustaining of the demurrer; for if the decree recites that thirty days are allowed the plaintiff within which to amend, and that in default of amendment at the expiration of that time the bill shall stand dismissed, the dismissal will not be complete without another order, confirming it; and so the first decree is interlocutory.[10] Moreover the dismissal must be a dismissal of the whole suit; for a decree sustaining a demurrer for improper joinder of certain defendants, and dismissing the suit as to them, is interlocutory only.[11]

§ 479. Upon what interlocutory decrees appeals may be taken.—Since error in any interlocutory decree may be assigned if an appeal is taken later upon a final decree in the cause,[12] it is less important to determine what is an interlocutory decree, than it is to determine what interlocutory decrees are ground for an immediate appeal to the Supreme Court, without awaiting the final decree in the cause. Not all interlocutory decrees will support immediate appeals, and the question whether a particular interlocutory decree does or does not support an immediate, or interlocutory appeal, as it is called, depends upon the statute. Section 2838 of the Code of 1907, provides that "from any decree * * * sustaining or overruling a demurrer to a bill in equity, or sustaining or overruling a plea to such bill * * * an appeal lies to the Supreme Court; * * * the appeal shall be heard and determined by the Supreme Court in preference to all other than criminal cases; and if the decree of the chancellor * * * is reversed, the court shall render such decree as should have been rendered by the chancellor."[13] Again section 2839 of the Code

[9] Herstein v. Walker, 90 Ala. 477; Strang v. Moog, 72 Ala. 460.

[10] Lide v. Park, 132 Ala. 222; McCrory v. Guyton, 45 So. Rep. 658.

[11] Randle v. Boyd, 73 Ala. 282.

[12] See footnote (1), supra.

[13] This section also allows an appeal from a decree dismissing a bill for want of equity; but that motion having been abolished, except perhaps in two unimportant instances (See §§ 403, 404, ante) that right of appeal can no longer be availed of.

of 1907, provides that "An appeal lies to the Supreme Court on all interlocutory orders, in term time or vacation, sustaining, dissolving, or discharging injunctions, which must be heard and determined at the first term after the appeal is taken, or if the Supreme Court is in session when the appeal is or has been taken, then the same shall be heard during such session."

And section 2840 provides that "An appeal lies from an order of the chancellor, made in term time or vacation, appointing or refusing to appoint a receiver, within thirty days from the filing of the order with the register; and such appeal must be taken and deemed by the Supreme Court as a preferred case, and must be heard during the term to which it is returnable in preference to all other than criminal cases, or other preferred cases having priority on the docket of the court."

And section 2845 provides that "from any decree rendered by a court of equity, * * * on a partial or annual settlement of an estate of a deceased person, an appeal lies to the Supreme Court."

While the nature of an appeal under this last section seems not to have been stated by the Supreme Court, the decree is undoubtedly interlocutory in its nature, because it may be modified at the final hearing; and that is one of the determining features of interlocutory decrees.[14]

The above sections of the Code embrace all the instances of interlocutory decrees upon which interlocutory appeals may be taken, and all errors in other interlocutory decrees must await review by the Supreme Court upon an appeal taken after the final decree in the cause.[15]

§ 480. Certain important decisions upon these sections.— The above quoted sections of the Code seem clear enough in their meaning, but a number of appeals have been taken upon decrees not within the letter of their scope; and so the apparent limits of the statutes have been extended by some decisions and restricted by others which may be better cited

[14] Cochran v. Miller, 74 Ala. 50, 63.

[15] Clark v. Spencer, 80 Ala. 345.

than explained. A decree sustaining a demurrer to a cross bill is not within the statute, on the theory that the fate of a crossbill is not necessarily decisive of the main suit, and that the purpose of the statutes is to settle the fate of the bill itself before the parties have sustained the expense and delay of taking testimony.[16] So a decree overruling a demurrer to an intervening petition is not an interlocutory decree within the meaning of the statute.[17]

An appeal is not allowed under the statute upon an order striking from the answer a demurrer which was incorporated in it.[18] And of course an appeal is not allowed from an order on exceptions to part of the bill or answer as impertinent;[19] nor from orders allowing or refusing to allow amendments;[20] nor from an order dismissing a petition to set aside a decree;[21] nor upon orders upon petitions generally.[22]

Moreover the form of the decree may prevent an interlocutory appeal upon it, even though the appeal would have been entertained if the decree had been formal. Thus a minute entry reciting as follows, "submitted for decree on demurrers to the bill and demurrers sustained," will not support an appeal.[23] An order dissolving a preliminary or temporary injunction is an interlocutory decree subject to review under the statutes, although the decision was rendered by a divided court.[24] A decree rendered upon a motion to dissolve an injunction for want of equity in the bill and upon the denials in the answer on file may be appealed from under the sta-

[16] Barclay v. Spragins, 80 Ala. 357, overruling Winn v. Dillard, 57 Ala. 167, same case, 60 Ala. 369. Barclay v. Spragins is followed in Jones v. Woodstock Iron Co., 90 Ala. 545, and in Festorazzi v. St. Joseph's Catholic Church, 96 Ala. 178. And compare Bickley v. Bickley, 129 Ala. 403, and McGaugh v. Holliday, 142 Ala. 185, holding that a decree dismissing a cross-bill for want of equity was not within the statute.

[17] Nabers v. Morris Mining Co., 103 Ala. 543.

[18] Richardson v. First Nat. Bank of Gadsden, 119 Ala. 286.

[19] Hood v. So. Ry. Co., 133 Ala. 374; Cleveland v. Ins. Co. of No. Am., 151 Ala. 191.

[20] Vandeford v. Stovall, 117 Ala. 344.

[21] Buford v. Ward, 108 Ala. 307.

[22] Clark v. Spencer, 80 Ala. 345; Buford v. Ward, 108 Ala. 307.

[23] Mann v. Hyams, 101 Ala. 431.

[24] Trump v. McDonnell, 112 Ala. 256.

tutes.[25] But prior to the express insertion of authority to review an order upon a motion to discharge an injunction that decree was not reviewable.[26] The section was amended to its present form in the Code of 1896.

Again the juxtaposition of certain phrases in the statutes must be noted. Thus the "thirty days" in section 2840 authorizing an appeal from an order of the chancellor appointing or refusing to appoint a receiver within thirty days from the filing of the order with the register, refers to the time after the filing of the order within which application must have been made to the chancellor, as well as to the time for taking an appeal; for while the appeal may be taken from the order either confirming or discharging the receiver,[27] an appeal will not be entertained from an order by the chancellor refusing a motion to discharge the receiver when the motion is made over thirty days after the order appointing him.[28]

§ 481. Jurisdiction of appeal not affected by consent.—Let it also be noted that the right of appeal from interlocutory decrees is not only limited by the statutes, but is also conferred by the statutes. Unless the jurisdiction of the appeal is within the statute defining it, jurisdiction cannot be conferred upon the Supreme Court by consent of the parties to the cause. The existence in the record of an appealable interlocutory decree is a jurisdictional fact.[29]

§ 482. Time for taking appeals from interlocutory decrees.—Finally as to the time within which appeals from interlocutory decrees must be taken, the statutes in each case provide; and if the appeal is taken after that time, it will be dismissed.[30] Section 2838 of the Code, authorizing appeals from decrees

[25] Jacoby v. Goetter, Weil & Co., 74 Ala. 427; Sholze v. Steiner, 100 Ala. 148.

[26] Ex parte Fecheimer, 103 Ala. 154; Ex parte Sayre, 95 Ala. 288.

[27] Meyer v. Thomas, 131 Ala. 111; Heard v, Murray, 93 Ala. 127.

[28] Hereford v. Hereford, 134 Ala. 321, citing Miller v. Lehman, 87 Ala. 517.

[29] Trump v. McDonnell, 112 Ala. 256; Richardson v. First National Bank of Gadsden, 119 Ala. 286; Nabers v. Morris Mining Co., 103 Ala. 543.

[30] Lide v. Park, 132 Ala. 222; Dennis v. Currie, 142 Ala. 637.

sustaining or overruling demurrers and pleas, requires the appeal to be taken "within thirty days after the rendition of such decree." Section 2839, authorizing appeals from various orders affecting injunctions, prescribes no time for taking the appeal; but the time is limited to six months by section 2868, which puts that limitation upon all appeals when no other is specially provided. But section 2839 requires "at least three days' notice of the appeal" to be given to the other party before it can be heard by the Supreme Court. Section 2840, providing appeals from orders appointing or refusing receivers, contains the above discussed phrase "within thirty days from the filing of the order with the register"; and this seems to limit the time within which the appeal must be taken, as well as the time within which the motion before the chancellor must be made upon which the order appealed from is rendered.[31] And appeals from decrees rendered on partial or annual settlements of estates of deceased persons, as authorized by section 2845 of the Code, may be taken at any time within twelve months after the rendition of the decree appealed from.

Before leaving the subject of interlocutory appeals it is proper to observe that their being preferred cases in the Supreme Court under the terms of the statutes, does not mean that they may be presented to the court before the time at which cases are submitted from the county in which they arise, but that after having been docketed and submitted to the Supreme Court they shall have precedence in being decided.

[31] Miller v. Lehman, 87 Ala. 517; Hereford v. Hereford, 134 Ala. 321.

CHAPTER XIX.

Answers.

§ 483. Definition of answers.—The answer is the pleading presented by the defendant in which he gives his side of the entire case presented by the bill. It may be presented after a demurrer and pleas have been overruled, or it may be presented without first presenting a demurrer or pleas, or it may be presented under section 3115 of the Code of Alabama with a demurrer and one or more pleas incorporated in it.[1]

§ 484. Answer consists of two elements.—The answer consists essentially of two elements: first, the statement or response made by the defendant to each of the statements, charges, and interrogatories contained in the bill, from which it takes its name of answer; and secondly, the additional facts, if any, not referred to in the bill, but brought forward by the defendant in defense of the suit.[2]

This twofold nature of answers had its origin in the Roman law, from which chancery pleading was largely derived; but in the Roman law the two elements were kept entirely separate. In chancery, however, "the answer has generally been treated as if it was homogeneous, and every part of it subject to the same rules. At one time, indeed, it has been assumed to contain the defendant's examination under oath; at another, to contain his defense; but the fact has seldom been intelligently recognized that it contained both of these, and the failure to do this, and to apply to it different and appropriate rules, according as it was presented to the court in the one aspect or the other, has caused infinite confusion in equity pleading."[3]

§ 485. Two elements should be kept separate.—In commenting upon this double nature of answers, Daniell says: "But although an answer has, in general, the twofold property

[1] The advisability of incorporating a demurrer or pleas in the answer has already been discussed. See §§ 448, 469, ante.

[2] Compare 2 Daniell Ch. Pr. 814.

[3] Langdell Eq. Pl. § 68.

above stated, it is seldom possible, in framing one, to keep the parts separate from each other, though when it is practicable to do so such a course is generally advisable."[4] By making an effort to that end, however, the pleader will find it much easier to keep the two parts separate than would at first appear; and when his side consists of an essential confession and avoidance of the case made by the bill, the value of having his defenses displayed systematically and consecutively for consideration by the court, will be apparent.

It is believed that the common practice in Alabama of inserting separate pleas in answers became current from a recognition of the value of tabulated defenses, the pleader desiring the benefit of system, even though coupled with the peril attendant upon not proving a plea. It seems that such pleaders have failed to recall the twofold nature of answers; or they would tabulate their several defenses as an answer alone, when they see fit to make one, and make use of a plea only when they have a complete single defense and when it is possible thereby to avoid making answer entirely.

§ 486. Two elements of answer as affected by waiver of oath.—The importance of distinguishing the two elements in answers is strikingly brought out by the effect of answers in Alabama not under oath. We have seen that the plaintiff in Alabama has the absolute right to make the defendant answer without oath; and that this is one of the four distinguishing principles of Alabama pleading, the English pleading requiring the defendant's oath to the answer, unless it was omitted with the consent of the court.[5] And the consequence of this dispensing with the oath in Alabama is that the answer becomes mere pleading.[6] It is not evidence or testimony (other than in its admissions) either for the plaintiff or for the defendant:[7] which means, of course, that

[4] 2 Daniell Ch. Pr. 814.

[5] Sec. 3096, Code of 1907. And see §§ 13-19, § 301, ante.

[6] Rainey v. Rainey, 35 Ala. 282; Blum v. Mitchell, 59 Ala. 535; Zelnicker v. Brigham, 74 Ala. 598; Ex parte Ashurst, 100 Ala. 573; Scott v. Brassell, 132 Ala. 660.

[7] Guthrie v. Quinn, 43 Ala. 561; Buchanan v. Buchanan, 72 Ala. 55; Watts v. Eufaula Nat. Bank, 76 Ala. 474; Scott v. Brassell, 132 Ala. 660.

the first element of answers, that which consists of the discovery or response from the defendant to the allegations of the plaintiff, is in such answers destroyed.

§ 487. When oath waived exceptions to sufficiency of answer not allowed.—So completely is the element of the answer as a response to the plaintiff's case destroyed by the waiver of the oath, that the Supreme Court has declared a rule forbidding any exceptions by the plaintiff to the sufficiency of an answer the oath to which has been waived.[8] And to allow otherwise would be absurd; for the first element of the answer amounts to the same thing as the defendant's deposition taken upon interrogatories, that being the actual history of answers;[9] and to take the deposition of a witness without having his oath to it, was supposed to be impossible.

§ 488. Though oath be waived, answer must show defenses.—But the deposition of the defendant in response to the plaintiff's statements and charges, has nothing to do with the defendant's own defenses. They constitute the second part or element of an answer; and of course, the plaintiff's waiver of the oath cannot relieve the defendant from setting up his case. And so Daniell, after recommending that the two parts of the answer be kept separate, as quoted above, continues as follows:—"It is, however, of great importance to the pleader in preparing an answer, to bear in mind that besides answering the plaintiff's case as made by the bill, he has to state to the court, upon the answer, all the circumstances of which the defendant intends to avail himself by way of defense; for it is a rule, that a defendant is bound to apprise a plaintiff by his answer of the nature of the case he intends to set up (and that too in a clear unambiguous manner;) and that a defendant cannot avail himself of any matter in defense which is not stated in his answer, even though it should appear in his evidence."[10]

§ 489. General denial by answer insufficient.—This quotation from Daniell has been made the basis of an important line of decisions in Alabama which have been referred to as

[8] Chancery Rule 34, Code of 1907.

[9] See § 13, ante.

[10] 2 Daniell Ch. Pr. 814.

holding a general denial in the answer of the case made by the bill insufficient, even when the answer is not under oath.[11] But while the decisions take that position, they take it only incidentally, and as a result of the primary and important position that a defendant cannot avail himself of an affirmative defense, whatever evidence he may have, unless he sets out the defense in the answer. That is to say, the second element of an answer, the defense, is the defendant's own case, regardless of what he denies of the plaintiff's bill; and he will not be allowed to prove it unless he sets it up.

Thus in Robinson v. Moseley[12] the bill was filed by a judgment creditor upon whose judgment execution had been returned "no property found," and sought to set aside as fraudulent a conveyance made by a debtor to his wife, charging that "this conveyance was voluntary, executed with intent, on the part of both grantor and grantee, to hinder, delay, and defraud the creditors of the husband, and was fraudulent and void against the pre-existing debt of the complainant." The answer admitted the indebtedness of the plaintiff averred in the bill, that it had been reduced to judgment, and that it had antedated the conveyance by the debtor to his wife; and then merely denied the allegations of the bill charging fraud, and "demanded strict proof thereof." It is a matter of substantive law that when a plaintiff has proved the existence of his debt prior to a conveyance by the debtor of substantial property, and has proved that the debtor has no other property with which to discharge the debt, the burden is shifted to the grantee in the conveyance, at law as well as in equity, to show that he paid value for the property and was not a party to a fraud.[13] And the court so held in this case, and refused to consider evidence that the husband was indebted to the wife, because her answer

[11] Robinson v. Mosely, 93 Ala. 70; Moog v. Barrow, 101 Ala. 209; Wood v. Riley, 121 Ala. 100; Gamble v. Aultman, 125 Ala.. 372; Penny v. McCulloch, 134 Ala. 580; Prestridge v. Wallace, 46 So. Rep. 970.

[12] 93 Ala. 70.

[13] Mobile Savings Bank v. McDonnell, 89 Ala. 434; Lehman v. Greenhut, 88 Ala. 478; Calhoun v. Hannan, 87 Ala. 277; Pollak v. Searcy, 84 Ala. 259.

did not affirmatively set up the defense. And in each of the other cases composing the line of decisions cited in the footnote, the principle involved was the same as that in Robinson v. Moseley.

In Gamble v. Aultman[14] Justice Tyson said: "In order to lift this burden affirmative averments of the facts relied on as constituting the consideration is as essential as satisfactory proof of their existence. The respondents in order to be accorded the advantage of evidence offered in support of the bona fides of the transaction, should have alleged in their answers the facts showing good faith, the actual payment of an adequate consideration, how, when, and in what the consideration was paid." Then after quoting the same passage from Daniell, he continues, "The answer must put in issue all the facts on which the defendant relies in bar of the relief sought by the bill, and evidence cannot be adduced of facts outside of these issues."

§ 490. Plaintiff cannot complain of general denial in answer not under oath.—The principle of these decisions in which it was held that a general denial by an answer not under oath is insufficient, being that it is insufficient merely from the defendant's standpoint as a pleading to sustain affirmative evidence in defense of the suit, they must not be understood as holding that a general denial in an answer to which oath is waived is insufficient from the plaintiff's standpoint as an answer to his bill. By waiving the defendant's oath, the plaintiff loses his right to complain by exception, as we have seen;[15] and no other way is left to him. All he can compel the defendant to do is to take issue upon the allegations of the bill; and he compels that by taking a decree pro confesso against the defendant unless the defendant answers or resists the suit.

§ 491. When a general denial not a specific denial.—But while the plaintiff cannot object to a defendant's general denial of the allegations of the bill when the oath to the answer is waived, it seems to be established that a general denial is not equivalent to a specific denial of all allegations

[14] 125 Ala. 372.

[15] See § 487, supra.

of the bill covered by it. Matters referred to in the bill which are presumed to be within the defendant's personal knowledge, are taken to be true in the form and to the extent alleged in the bill, notwithstanding the defendant's general denial. That is to say, in the absence of a specific denial by the defendant, they are supposed to be admitted by him.[16]

§ 492. Matters within defendant's own knowledge admitted unless denied.—But this holding that a general denial amounts to no denial at all, undoubtedly arose from a failure to note the distinction between answers under oath and answers to which the oath has been waived. It has always been a rule of chancery pleading that a general denial in an answer under oath instead of a detailed response to the averments and charges of the bill is insufficient;[17] because the answer "consists of the examination of the defendant to the allegations in the bill, or, in other words, of the answer of the plaintiff's case."[18] But it was in its first element only, namely, that on an answer that it was insufficient; and the remedy to the plaintiff was to take exceptions to the answer and have it referred to a master to decide whether the defendant should not answer more fully.[19] It was not the rule that an insufficient general denial amounted to no denial at all. On the contrary, in Savage v. Benham [20] it was said, "Conceding the general principle that where a fact is alleged which prima facie is within the knowledge of the defendant, and which he fails to answer, it must be regarded as admitted by him, so far as to dispense with proof by complainant to establish its truth, as the same is asserted in Kirkman v. Vanlier, (7 Ala. Rep. 217), yet we do not think it applies to the case before us. Here the defendant denies the allegation of the bill. * * * That such an answer is objectionable as insufficient, there is no doubt, and had the plaintiff excepted to it, the exception should have been sustained. It is not sufficient that an answer contains a general denial of the matters charged."

[16] Moog v. Barrow, 101 Ala. 209; Prestridge v. Wallace, 46 So. Rep. 970.

[17] 2 Daniell Ch. Pr. 835.

[18] 2 Daniell Ch. Pr. 819.

[19] 2 Daniell Ch. Pr. 835, 877.

[20] 17 Ala. 119, 131, per Chilton, J.

The rule that silence by the defendant in an answer under oath as to matters presumably within his own knowledge may be taken as his admission that they are correctly alleged in the bill, has been many times affirmed in Alabama.[21] But the reason of the rule is apparent—that the oath prevents the defendant from denying what he knows to be true; and that the admission of the matters in the form in which they are alleged in the bill is all the plaintiff could desire.

The notion that a general denial by the defendant amounts to no denial at all, has never been applied as yet by the Supreme Court of Alabama to any other matter of the bill than that supposed to be within the defendant's own knowledge; and in view of the early decisions and the English practice to the contrary is not likely to be applied any further.

§ 493. How denials by the defendant should be made.—But be that as it may, the defendant should not rest his case upon a general denial of the truth of the bill, or even of any special matter set out in it. If the answer is under oath, "the defendant must speak directly and without evasion—must not only answer the charges literally, but must confess or traverse the substance of each charge."[22] And if the answer is not under oath, and the defendant does not choose to answer fully, he must at least deny specifically each allegation or charge of the bill which he does not expressly admit, in order to put it in issue. "The denials of the answer must be positive, clear, and distinct, and not evasive, uncertain, or illusory."[23] Moreover the denials must not be confined to the language of the bill merely or be only literal denials.[24] Such a denial is called a negative pregnant, and is not sufficient because it does not deny even the slightest variation from the form of allegation in the bill, even though the substantial fact be the same.[25] Therefore the defendant must traverse the point of substance.

[21] Smilie v. Siler, 35 Ala. 88; Grady v. Robinson, 28 Ala. 289; Savage v. Benham, 17 Ala. 119; Kirkman v. Vanlier, 7 Ala. 217, 234.

[22] Per Chilton, J., in Savage v. Benham, 17 Ala. 119, 131.

[23] Per Somerville, J. in Craft v. Russell. 68 Ala. 9. And see Rembert v. Brown, 17 Ala. 667.

[24] Henry v. Watson, 109 Ala. 335.

[25] White v. Wiggins, 32 Ala. 424; Russey v. Walker, 32 Ala. 532; Savage v. Benham, 17 Ala. 119.

§ 494. Where some averments of the bill are neither admitted nor denied.—Exactly what remedy the plaintiff has when an answer to which oath is waived leaves undenied as well as unanswered certain allegations of the bill, it is difficult to say. The plaintiff would seem to have the right to require his entire case to be confessed or put in issue; and yet there seems to be no instance of a decree pro confesso to parts of the bill when an answer has been filed which actually applies to a part only, and yet pretends to answer the whole. No other remedy seems open to the plaintiff, however, since Chancery Rule 34 is absolute that exceptions to the sufficiency of the answer cannot be taken when the oath is waived.

The dilemma is escaped in injunction suits where temporary injunctions have been granted, because the defendant usually seeks a dissolution of the injunction, and "it is a well settled rule, that upon a motion to dissolve an injunction, the answer can be regarded only so far as it is responsive to the allegations of the bill."[26] But in any other case the dilemma may arise, and it is a demonstration of the inadvisability of waiving the oath to the answer if it is unnecessary to do so.

§ 495. Weight of answer under oath denying plaintiff's case.—The history of answers being that an answer under oath is the testimony of the defendant upon the various charges and interrogatories contained in the bill,[27] it followed that such an answer involved many of the same principles involved in taking the testimony of any other witness; and while positive allegations in the answer responsive to the charges or interrogatories in the bill were held to be evidence only to the extent that they were admissions in favor of the plaintiff, because the plaintiff could read the answer to prove his side of the case while the defendant could not read the answer to prove the defense,[28] it was a rule that negative allegations in the answer were evidence in favor of the defendant. Daniel says, "he is entitled to have benefit by his

[26] Per Dargan, C. J., in Rembert v. Brown, 17 Ala. 667. And see Stallworth v. Lassiter, 59 Ala. 558.

[27] See § 484, supra.

[28] 2 Daniell Ch. Pr. 978, 983; Land Mortgage, &c., Co., v. Vinson, 105 Ala. 389; Agnew v. Magill, 96 Ala. 496.

answer, so far as it amounts to a denial of the plaintiff's case, unless the denial by the answer is contradicted by the evidence of more than one witness."[29]

The Supreme Court of Alabama has gone in one case even further than this, and laid down that "a sworn answer, responsive to the charges of the bill, and denying them, is evidence for the defendant, which can be overturned only by the opposing testimony of two witnesses or of one witness with corroborating circumstances."[30] The opinion added that "so far as the statements of the answer are not responsive, or are of matters in avoidance of the facts stated in the bill, they are not evidence;" and it is probable that the entire expression of opinion upon the subject was dictum; but it represented the generally accepted view as to the weight of an answer under oath,[31] and shows why the plaintiff desired to avoid it.

§ 496. Weight of answer under oath when plaintiff swears to bill.—The commissioner who compiled the Alabama Code of 1896, invented a plan, as amended by the joint legislative committee revising his work, by which "The rule requiring two witnesses, or one witness and coroborating circumstances,

[29] 2 Daniell Ch. Pr. 983. Professor Langdell says: "This is in consequence of a rule of evidence in equity borrowed from the civil law. By the latter system, two witnesses at least are required for the proof of any fact." Langdell Eq. Pl. § 78. It is unwise here to go into the origin of that rule of Roman Law pleading. Certain it is that the answer is evidence as well as an admission when in favor of the plaintiff; for under certain circumstances the answer of one defendant may be read against another, and it is always evidence in favor of the defendant upon the matter of costs. 2 Daniell Ch. Pr. 982, 983.

[30] Agnew v. Magill, 96 Ala. 496. The reason for the rule given by the court, namely that the plaintiff consents that the answer shall be testimony upon those points, was given in an earlier case, Marshall v. Croom, 52 Ala. 554, where Mr. Justice Story, 2 Eq. Jur. § 1528, was cited. The latter citation is at least as broad as the statements in Agnew v. Magill, and cites many early English cases as authority.

[31] B'ham Nat. Bank v. Steele, 98 Ala. 85; Pattison v. Bragg, 95 Ala. 55; Marshall v. Croom, 52 Ala. 554; Beene's Heirs v. Randall's Heirs, 23 Ala. 514.

to overcome an answer under oath denying the allegations of the bill, is abolished in all cases where the bill is sworn to by the complainant; and such answer shall have only such weight as evidence as the evidence of such defendant taken upon interrogatories."[32] This statute has the effect of relieving the court from the necessity of determining the issues raised by a sworn answer from the relative number of witnesses, and places it in the position of a court of common law to base its conclusion upon the credibility of the testimony, as it does when the oath to the answer is waived.

It is not certain but that the statute may give the defendant the benefit of the positive allegations in his answer as if given in his deposition, as well as the negative allegations, and in this respect broaden the scope of the answer as evidence. But until the Supreme Court so construes it, such a view would be unsafe, because it would deprive the plaintiff of the benefit of cross-examination of the defendant upon his affirmative defenses.

At all events the effect of the section in dispensing with the dangers incident to the English answer when given under oath, would seem a great benefit. It enables the plaintiff to obtain without great danger the defendant's accurate responses to the bill, as well as his pleading, and that alone would seem enough to recommend the practice.

§ 497. Scope of the answer.—The scope of the answer when put in under oath has been already adverted to in quotations from decisions. It should reply in detail to each of the allegations of the bill.[33] It must be full upon every matter within the defendant's knowledge, and he must use diligence to acquire information within his power to comply with the discovery asked for.[34] "As to facts which have not happened within his own knowledge, the defendant must answer as to his information and belief, and not as to his information merely, without stating any belief either one way or the

[32] Sec. 3117, Code of 1907. For a full discussion of the value of this section, see § 16 et seq., ante.

[33] Savage v. Benham, 17 Ala. 119; Henry v. Watson, 109 Ala. 335.

[34] 2 Daniel Ch. Pr. 826, 831.

other."[35] But he should point out distinctly what statements he makes upon his own knowledge and what upon information and belief; and of course his denials made merely upon information and belief do not amount to evidence in his behalf.[36]

The defendant need not answer any statement, charge, or interrogatory which he is not expressly required to answer by the foot-note of the bill.[37] But this probably does not prevent his answering and putting in issue "any allegation or charge or interrogatory which he may consider it necessary to his defense to answer."[38] And "nothing can be considered impertinent in an answer, and subject to exception as such, which tends to disprove the case made by the bill."[39]

§ 498. Admissions in the answer.—Of course the primary value to the plaintiff of the answer is the admissions it contains, and its scope is unimportant to him otherwise. It is a rule of chancery procedure that the plaintiff can read the answer of the defendant for its admissions; and admissions by the answer whether as equivalent to testimony when made under oath, or as mere pleadings when not made under oath, relieve the plaintiff of the necessity of proof.[40]

But it is another rule of chancery procedure that the plaintiff cannot read an admission of the answer without reading also all the qualifications and denials which constituted a part of the response. "The court must look to the denials, as well as the admissions, contained in the answers."[41] "It must not be supposed that in permitting a plaintiff to read a portion only of the defendant's answer in support of his case, a court of equity will allow a plaintiff to read a passage from a defendant's answer, for the purpose of fixing a defendant with an admission, without reading the explanations and quali-

[35] 2 Daniell Ch. Pr. 831.

[36] Stallworth v. Lassiter, 59 Ala. 558; Agnew v. Magill, 96 Ala. 496.

[37] Chancery Rule 11, Code of 1907.

[38] 2 Daniell Ch. Pr. 821.

[39] Saltmarsh v. Bower, 22 Ala. 221, 228, as summarized by Mr. Justice Mayfield in 3 Mayfield's Dig. 321.

[40] Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193; Land Mtge. Co. v. Vinson, 105 Ala. 389; Crawford v. Kirksey, 50 Ala. 590.

[41] Per Peters, J., in Crawford v. Kirksey, 50 Ala. 590. 598.

fications by which the admission may be accompanied, even though such explanations and qualifications be contained in a distinct passage from that offered to be read."[42]

Therefore it may be more important to the defendant that he extend the scope of the answer than it is to the plaintiff.

And with reference to the defendant's admissions another important point must be noted The plaintiff can avail himself of them only if they support allegations in the bill. Even though they reveal a possible cause of action in the plaintiff that will not heal the plaintiff's failure to state it. The answer cannot inject equity into the bill.[43]

§ 499. Defendant may protect himself from full answer.—Sometimes the bill may not be subject to demurrer, and yet the defendant believes he should not be required to give response or testimony upon all its allegations. In such a case he may file such answer as he thinks proper, and make objection to the part of the bill not answered, giving his reasons for not answering.[44] The sufficiency of the answer will then be determined upon exceptions taken by the plaintiff.[45]

§ 500. Defendant may apply for leave to answer specially.—If the defendant desires to answer specially only, he may apply to the court for leave to do so, giving his reason. But his right to answer specially may be contested; so the application must not be granted except upon reasonable notice to the plaintiff.[46]

§ 501. When answer must be sworn to.—The fullness of the answer, so far as it results from the obligation of the defendant to give discovery, depends primarily upon whether it is made under oath; for if the defendant is not compelled to admit allegations in the bill not publicly known to be true, the chances are that he will not do so. So the first point for the pleader to learn is when the answer must be sworn to.

The history of chancery pleading was built up around answers under oath, and no statute or decision having changed

[42] 2 Daniell Ch. Pr. 978.

[43] Tait v. Am. Freehold Land Mtge. Co., 132 Ala. 193.

[44] Sec. 3113, Code of 1907.

[45] Bentley v. Cleaveland, 22 Ala. 814.

[46] Sec. 3114, Code of 1907.

their historical status, an answer under oath is still the normal answer, although in fact they have long been the exception. The Code provides that "when a bill is filed for any other purpose than discovery only, the plaintiff may waive in or upon the bill, the answer being made on the oath of the defendants, or either of them."[47] And so unless the bill explicitly waives the answer being made under oath, an answer under oath is required.[48]

But the oath to the answer may be waived as to some of the defendants and not as to others[49] although it may be that so doing would be ground for exception in cases where the answer of one defendant would be evidence against his co-defendant.[50]

The oath cannot be waived, however, in the original bill, and required as to an amendment[51] although, if the plaintiff attempts to do so, the defendant may probably treat the amendment as determining his method of answer,—that is when he has not already answered the original bill,—for the bill even after amendment constitutes but one whole.[52]

§ 502. Special defenses under oath.—But without regard to the waiver of oath to the answer, if the defendant chooses to set up any special defense to the suit which is required by statute to be under oath, of course the answer must be sworn to in order to get the benefit of the defense. This has already been pointed out in the chapter upon pleas, and the authorities were there cited.[53] It will be noted, however, that this statutory oath in such cases is to the defense set up, which is the second element in the answer, and not the answer proper, as responsive to the plaintiff's bill; which is the element of the answer to which the oath may have been waived.

[47] Sec. 3096, Code of 1907; Russell v. Garrett, 75 Ala. 348;

[48] Paige v. Broadfoot, 100 Ala. 610; McKenzie v. Baldridge, 49 Ala. 564.

[49] Gibson v. Trowbridge Furniture Co., 93 Ala. 579; Tutwiler v. Tuscaloosa C. & I. Co., 89 Ala. 391.

[50] County of Dallas v. Timberlake, 54 Ala. 403.

[51] McCaw v. Barker, 115 Ala. 543.

[52] Taunton v. McInnish, 46 Ala. 619; Wilkinson v. Bradley, 54 Ala. 677.

[53] See § 471, ante, and cases cited.

§ 503. How answer must be sworn to.—The accuracy with which the oath to an answer is made is unimportant except where some of the averments in the answer are stated upon information and belief only. The point was fully discussed and the authorities cited and quoted in an earlier chapter treating of affidavits to bills.[54] In such instances it is important to distinguish clearly in the oath what allegations of the answer are sworn to as facts, and what allegations are sworn to upon information and belief only. But for the purpose of a denial merely, and its effect upon the proof of the bill, a sweeping allegation in the oath "that facts stated in the forgoing answer are true," is enough, if the answer contains some unequivocal denials, whether other statements are made upon information and belief or not.[55]

And the mode of verification of the answer will never be noted first in the Supreme Court. If the plaintiff does not object below, on appeal the defect will be regarded as waived.[56]

§ 504. Defendants making separate answers.—The Alabama decisions have not discussed the right of several defendants joined in one suit to make their answers separately instead of together, except to the extent that one joint-defendant may be required to answer under oath while the oath of another is waived.[57] So it is best not to discuss it here, but to refer the pleader at once to the full discussion by Daniell. Suffice it to say, then, that the answers by co-defendants should be joint unless there is some good reason to make them separate; for the defendants will not be allowed to multiply costs by filing separate answers needlessly when their responses and defenses are the same.[58] So when the defendants constitute a firm one partner may answer for all, if the other members of the firm are not charged with personal knowledge of the facts.[59]

§ 505. Relief by answers.—It is inadvisable to discuss in this chapter the details of the pleading by which a defendant

[54] See §§ 304, 305, ante.

[55] Weems v. Roberts, 96 Ala. 378.

[56] Hogan v. Branch Bank of Decatur, 10 Ala. 485.

[57] See footnotes (49) and (50), supra.

[58] 2 Daniell Ch. Pr. 840, et seq.

[59] Reynolds v. Dothard, 11 Ala. 531.

may obtain against the plaintiff recognition of counter claims or set-offs or positive relief. Such matter are of sufficient importance to require a special chapter. Moreover since they are more than defenses, they would be improperly intruded into the systematic study of the progress of the plaintiff's cause. It will sufficiently warn the pleader at this point to note the possibility of the defendants being entitled to affirmative relief, and to say that no affirmative relief can be obtained upon an answer only; for the defendant to obtain affirmative relief it is necessary to resort to a cross-bill. The examination of cross-bills and matters akin to them in Alabama will be taken up in a later chapter.

§ 506. Amendments to answers.—The right of amending answers does not now differ materially from the right of amending bills, to which an entire chapter has been already given;[60] except that the defendant is not affected by the peril of making a departure in his amendment, since as we have seen, he was never limited in the number and character of his different defenses. The section of the Code under the authority of which amendments to answers are made is the same as that providing for amendments to bills;[61] but the wording applicable to bills, namely that "amendments to bills must be allowed at any time before final decree * * * to meet any state of evidence which will authorize relief," is different from that applicable to answers, namely that "amendments to answers must be allowed at any time before final decree, so as to set up any matter of defense." For a time the plaintiff was required to limit his amendments to the bill to meeting evidence already taken in the cause, whereas the defendant could amend the answer as a basis for new evidence entirely;[62] but as we have seen the narrow wording applicable to bills has been disregarded in recent decisions, and the plaintiff seems to be allowed to bring in by amendment any additional matters not making a new case as freely as if the wording of the Code affecting bills and the wording affecting answers were the same.[63]

[60] See Chap. XI, supra.

[61] Sec. 3126, Code of 1907.

[62] Ex parte Ashurst, 100 Ala. 573.

[63] See § 350, supra.

The history of the right of amending the answer is given by Justice Haralson in Ex parte Ashurst.[64] But as it is substantially the same as the history of amendments to bills, it will not be repeated here. At present the defendant can amend his answer at any time before final decree as of right; "but such amendments must be allowed on such terms as the chancellor may impose, not extending beyond the payment of all costs; and if an amendment be allowed at the hearing," the plaintiff "shall be entitled to a continuance as a matter of right; and if the cause is continued, both parties shall have the right to take additional testimony; and if an amendment be allowed in vacation, both parties shall have the right to take additional testimony without a special application."[65]

But if the amendment is offered after submission of the cause for final decree, it is error to allow it without the consent of the plaintiff, unless the submission is first properly set aside upon due notice.[66]

And finally under the statute allowing the incorporation of all defenses in the answer, it is always allowable to incorporate a demurrer or pleas in the answer by way of amendment,[67] and even if a plea of the statute of limitations so incorporated in the answer is inconsistent with the discovery revealed, the plea will not lose its effect on that account.[68]

The procedure in amending answers as to notice of making application and order of allowance thereon, is the same as that provided for amending bills.[69]

§ 507. Answer to amendments.—If the bill is amended before the answer is filed, the answer will be to the bill as amended, but without otherwise taking note of the fact of amendment; since a bill, although amended, is still to be treated as one entire bill.[70] But if the amendment of the bill is made after answer is filed, the answer must stand, at

[64] 100 Ala. 573.

[65] Sec. 3126, Code of 1907.

[66] McMinn v. Karter, 116 Ala. 390; Wilkinson v. Buster, 115 Ala. 578.

[67] Harland v. Person, 93 Ala. 273; Reese v. Bromberg, 88 Ala. 619; Shaw v. Lindsay, 60 Ala. 344.

[68] Bradford v. Spyker's Admr. 32 Ala. 134.

[69] Chancery Rules 39 and 40, Code of 1907.

[70] Taunton v. McInnish, 46 Ala. 619.

least in so far as the matter need not be changed, and the defendant should meet the amendment to the bill by an amendment to the answer. The answer as amended then becomes an entirety, like the bill as amended, and unnecessary repetition and cost is avoided. By the English practice an entirely new answer repeating the matter already presented was impertinent,[71] and is doubtless so in Alabama, too; for new matter in section 3128 of the Code of 1907 provides that "such pleadings shall only be allowed as amendments to the defensive pleadings already in the cause, and not as originals."

§ 508. Plaintiff may require answer to amendment to bill.—The same section of the Code of 1907 contains another new provision allowing the plaintiff to require an answer to such an amendment to the bill. instead of a demurrer or a plea, that is, when the bill is amended after the first answer has been filed. This provision is peculiar, and may cause injustice, for instance, when the amendment makes the bill clearly multifarious; for while the section expressly provides that a demurrer or a plea may be incorporated in the answer so required, the new matter although certain to be struck out by the demurrer, will nevertheless have to be answered, and the discovery upon it illegally obtained.

§ 509. Time for filing answers.—If the defendant makes his answer his first pleading to the bill instead of filing a demurrer or a plea, he must file his answer within thirty days after being served with process; or if he has been brought in by publication, within thirty days after the period specified in the order of publication, if the publication required by the order of publication has been perfected.[72] But if he has a good excuse for desiring more time, it can usually be obtained upon application to the court showing his reasons, if the plaintiff will not give his consent. The penalty of not observing the time limit, without the consent of the plaintiff or the court, is a decree pro confesso, the effect of which has already been discussed.[73] We have seen, too, the terms upon

[71] 2 Daniell Ch. Pr. 839.
[72] Sec. 3107, Code of 1907.
[73] See Chapter XII, ante.

which a decree pro confesso may be set aside; and they need not be repeated here.[74]

If the bill is amended either before or after an answer has been filed, thirty days are allowed the defendant after notice of the amendment, within which to answer it, unless the matter of the amendment has already been denied by the defendant in some previous answer; and the court can extend this time when justice requires it.[75]

But in all cases, "a defendant who has excepted to a bill for scandal or impertinence, shall not be placed in contempt for want of an answer, until a decision on the exceptions."[76]

§ 510. Mode of signing answers.—It is not necessary in Alabama for the defendant's counsel to sign the answer if the defendant signs it himself, since a person may prosecute or defend a suit in Alabama without employing counsel at all.[77] And when the answer is made under oath, of course the defendant must always sign it in making the oath.

If the answer is not made under oath, however, the defendant rarely signs it under Alabama practice; and then it would seem proper, and it is the practice, for the defendant's solicitor to sign it, in order to show that the answer is authentic. When a licensed attorney represents a party to a cause, it is presumed that he is properly authorized to do so, even though the defendant be an infant.[78]

Answers of minors and answers of insane persons are of course signed by their guardians or guardians ad litem defending for them; and the methods of their recognition or appointment have already been discussed in the chapters relating to parties to the cause.

§ 511. Answers taken by a commissioner.—When the answer of a non-resident at a distance is required, and the oath is not waived, it is allowable to follow the old English practice and to appoint a commissioner to take it.[79] But when the commission issues from the chancery court, it must be per-

[74] See § 376, ante.

[75] Chancery Rule 48, Code of 1907.

[76] Chancery Rule 33, Code of 1907.

[77] May v. Williams, 17 Ala. 23.

[78] Hilliard v. Carr, 6 Ala. 557.

[79] 2 Daniell Ch. Pr. 856, 857.

fect, containing no blanks; and the name of the commissioner cannot be left blank in order that he may be selected and his name inserted later;[80] for it is like taking a deposition.

§ 512. Exceptions to answers: different grounds.—Exceptions to answers may be based upon impertinence or prolixity of the matter set out in the answer, which is the ground of exception most commonly occurring, although rarely taken advantage of; or they may be based upon scandalous matter in the answer; or they may be based upon the insufficiency of the answer as a response to the allegations or interrogatories contained in the bill.[81] But by Chancery Rule 34, exception to the sufficiency of an answer cannot be taken under Alabama practice when the oath to the answer has been waived in the bill; although if exceptions are taken any way, and the rule is not raised against them, it seems that they will be considered.[82]

An answer may be subject to all these objections at the same time; but under the English practice if the plaintiff wished to object to impertinence or scandal in the answer, he had to obtain a decision upon those points before a decision upon its sufficiency, and before taking any other step in the cause; or those objections would be waived.[83] And that rule probably obtains with us.

What constitutes impertinence or scandal in pleadings has already been pointed out in discussing their effect when contained in bills;[84] and the sufficiency of the answer as a response to the statements and questions of the bill of course depends upon the circumstances of each particular case.[85]

§ 513. Mode of taking exceptions and procedure.—The mode of taking exceptions to the answer is by separate paper filed, pointing out clearly the particular parts of the bill excepted to for impertinence or prolixity or scandal; and if the exceptions are for insufficiency, they must point out the parts of

[80] Guice v. Parker, 46 Ala. 616.

[81] 2 Daniell Ch. Pr. 872.

[82] Chancery Rule 34, Code of 1907; Richards v. Dougherty, 133 Ala. 569.

[83] 2 Daniell Ch. Pr. 873.

[84] See §§ 225, 226, 227, ante.

[85] Compare Bentley v. Cleaveland, 22 Ala. 814.

the bill which the plaintiff conceives not to have been answered, and must pray "that the defendant may, in such respect, put in a full answer to the bill."[86]

Exceptions to answers for any reason must be made within sixty days after the answers are filed, and notice must be given by the register of the day for hearing them.[87]

The procedure before the register in hearing exceptions for scandal and impertinence has already been pointed out in discussing exceptions for those matters in bills; and the procedure is the same in case of answers.[88] And the procedure upon exceptions for insufficiency of answers is also the same, except that Chancery Rule 36 provides as follows: "Should the register decide, on exceptions to an answer for insufficiency, that the exceptions be allowed, he shall in his order name a day when a further answer must be filed; and if the defendant fails to answer by that day, or puts in an insufficient answer, the register must enter a decree pro confesso, or, at the election of the complainant, issue an attachment, to be followed, if need be, by a writ of sequestration, to coerce a sufficient answer."

§ 514. Testing answers.—There is no other method of testing the sufficiency of answers than by exception; and however apparent the deficiency may be, if in any respect the paper filed is an answer to the bill, it stands as such and must be excepted to; it cannot be stricken from the file.[89]

And it will be noted that the provision for testing the sufficiency of answers refers only to their sufficiency as responses to the bill, that is, to their first element as answers. There is no way whatever to test the sufficiency of the second element of an answer, its value as a defense or as containing a defense to the bill. A demurrer to an answer is unknown.[90]

There is a method, however, for testing an answer and disposing of the suit at the same time without going into the taking of testimony; and that is by setting down the cause

[86] 2 Daniell Ch. Pr. 877.

[87] Sec. 3131, Code of 1907.

[88] Chancery Rules 35, 37, 38, Code of 1907; §§ 228, 229, 230, ante.

[89] May v. Williams, 17 Ala. 23.

[90] Glaser v. Meyrovitz, 119 Ala. 152.

for hearing upon bill and answer without testimony, which will be explained in the next chapter.

It is sometimes complained of as a defect in chancery practice not to allow the plaintiff by demurrer to test the answer as a defense in like manner as the defendant may test the bill; but it is believed that such a practice would not generally help the plaintiff. If the responses of the answer deny the truth of the bill, it would be unnecessary to test the defenses until the bill be proven; unless the plaintiff is willing to abandon the suit if the defenses are held good without regard to their truth; and if the responses in the answer substantially confess the bill, then the value of the defenses in the answer depends no more upon their validity than upon their truth; and to test their validity before their truth would hardly enure to the benefit of the plaintiff. The burden of proving the defenses is upon the defendant, and to require him to prove a bad defense would be better for the plaintiff than to show him that an amendment of his answer is necessary.

If, however, the plaintiff is willing to abandon the suit at once in case the defenses set up in the answer are good, and if the defendant is to be precluded from setting up new defenses in case those presented in the answer are substantially bad, then the English practice afforded an adequate test of answers in the hearing or bill and answer without testimony.

CHAPTER XX.

Hearing on Bill and Answer.

§ 515. Value of a hearing upon bill and answer.—We have seen in the last chapter that the plaintiff is allowed to test the answer as an answer by taking exception to its sufficiency and having a reference to the register to decide whether the defendant must answer more fully.[1] And we have seen further that the plaintiff would gain nothing from testing the answer as a defense before the final hearing, even if he could do so by demurrer; because if the answer were tested and held bad, the defendant would simply renew his defense by an amendment, whereas as the practice stands, the defendant files his answer at his peril, and will lose either if it is invalid as a defense, or if the defense is not proven to be true.

There is not the same reason why a plaintiff should test an answer, that there is why he should test a plea. When the defendant files a plea, he usually does so in order to avoid answering. For if the plea sets up an affirmative defense, and the defense is a good one, there will be no need of an answer to the statements and interrogatories of the bill. And so the plaintiff desires to test the plea because he cannot obtain an answer until the plea is held bad.

But after the defendant has filed an answer to the statements and interrogatories of the bill it is usually immaterial to the plaintiff whether the formal sufficiency of the affirmative defenses is determined before the hearing.

It may be a gain to the plaintiff, however, when the defenses in the answer are entirely without equity, to have them decreed to be so once for all, thereby terminating the cause without the opportunity to the defendant to amend. This corresponds in the main to demurring to the bill for want of equity, and was called in English practice setting down the cause to be heard upon bill and answer only. But there is one difference between this proceeding and the defendant's

[1] See § 512, ante.

demurrer for want of equity in the bill, and that is that if the answer is held to be good the plaintiff loses his suit;[2] whereas when a demurrer for want of equity is overruled, the defendant may answer. But the difference is not real; for on the hearing upon bill and answer the plaintiff's bill is being considered as well as the defendant's answer, and the bill ought always to state the plaintiff's case as full as it can be made; whereas on demurrer to the bill the defendant's case has not yet been presented at all.

§ 516. How answer is to be regarded.—Regarded therefore in the light of a test of the equity of the answer, it would seem to be just when the plaintiff sets down the cause upon bill and answer that all the allegations in the answer should be taken as true. And that was the English practice[3] and the early Alabama practice as well.[4] But from the fact that the answer consists, as we have seen in the last chapter, of two distinct elements, the response to the plaintiff's case, as well as the presentation of the defendant's case, the answer usually contains replies which have nothing to do with the defendant's equity; and for the purpose of testing the equity of the answer, there is no reason why these replies should be taken as true. This anomaly was noticed by Professor Langdell,[5] and it seems to have been noticed also by the early Alabama lawyers; for an old section of the Code provides that when a case is heard upon bill and answer under oath "the answer must be taken to be true so far as it is responsive to the allegations of the bill."[6] And this has been construed to mean that matter not responsive to the bill is not taken to be true at a hearing upon bill and answer, any more than at a hearing upon bill, answer, and proofs.[7]

Unfortunately, however, the legislators in framing that statute confused the element of the answer as a response to the bill,

[2] Langdell Eq. Pl. § 83; 2 Daniell Ch. Pr. 1189.

[3] 2 Daniell Ch. Pr. 1190

[4] White's Heirs v. The President of the Florence Bridge Co., 4 Ala. 464; Forrest v. Robinson, 2 Ala. 215.

[5] Langdell Eq. Pl. § 83.

[6] Sec. 3116, Code of 1907, first appearing as section 2902, Code of 1852.

[7] Keiffer v. Barney, 31 Ala. 192; Wynn v. Rosette, 66 Ala. 517.

and the element of the answer as a defense to the bill; and since the affirmative defenses had already been termed "irresponsive" to the bill, just as matter irresponsive to the interrogatories is so termed,[8] the defenses set up in the answer were also cut out by the statute, and upon a hearing upon bill and answer under oath are not admitted in Alabama.[9] Of course the result is that the setting down a cause upon bill and answer under oath is in Alabama a comparatively valueless proceeding, since it in no way tests the equities of the defenses, and is therefore limited to cases where the answer admits the bill, or the defenses are so referred to in the bill that setting them up may be said to be responsive to it.[10] And as it is too late for the Supreme Court to construe the word "responsive" to include affirmative defenses set up in the answer,[11] so as to have them included in the matter admitted by the plaintiff upon setting down a cause for hearing upon bill and answer, nothing but a new statute can revive that excellent method of quickly disposing of a cause.

§ 517. Effect in Alabama of setting down the cause upon bill and answer when under oath.—It being established in Alabama therefore by the Code[12] and the decisions that upon setting down the cause upon bill and answer under oath the answer is taken to be true only so far as it is responsive to the allegations of the bill, it results that the bill is taken to be true so far as it is admitted in the answer, but the answer is taken to be true to a very limited extent. It is taken to be true so far as it states matters in response to interrogatories in the bill;[13] and probably so far as it corrects allegations stated or charged in the bill to which answer is required;[14] even though the corrections be made upon information and

[8] Fenno v. Sayre, 3 Ala. 458, 477; Forrest v. Robinson, 2 Ala. 215.

[9] Wynn v. Rosette, 66 Ala. 517; Keiffer v. Barney, 31 Ala. 192.

[10] Frazer v. Lee, 42 Ala. 25. And compare Speakman v. Vest, 46 So. Rep. 667. (Feb. 1908.)

[11] Agnew v. McGill, 96 Ala. 496; Thorington v. City Council of Montgomery, 88 Ala. 548; Barton v. Barton, 75 Ala. 400; Buchanan v. Buchanan, 72 Ala. 55; Rembert v. Brown, 17 Ala. 667; and many other cases turning on the meaning of "responsive."

[12] Sec. 3116, Code of 1907.

[13] Fenno v. Sayre, 3 Ala. 458.

[14] Foxworth v. White, 72 Ala. 224; Frazer v. Lee, 42 Ala. 25.

belief.[15] And of course express denials in the answer are taken to be true, as they merely eliminate statements in the bill not admitted or answered. But the defenses are not admitted.[16]

It is apparent that this reduces the question what part of the answer is taken to be true, to the somewhat uncertain question what is responsive; and that may be very difficult to determine.

§ 518. Effect in Alabama of setting down the cause upon bill and answer when not under oath.—Moreover this question, what is responsive to the allegations of the bill, is the only measure by which to distinguish the effect of setting down the cause upon bill and answer when the answer is under oath, and setting down the cause upon bill and answer when the answer is not under oath.

Sec. 3116 of the Code provides that on such a proceeding the answer shall be taken to be true so far as it is responsive to the allegations of the bill "except in those cases where the complainant has waived the oath of the defendant to the answer." So it may be asserted broadly that when a cause in Alabama is set down for hearing upon bill and answer not under oath, nothing of the answer is taken to be true except its express admissions,[17] and of course its express denials.[18]

§ 519. Note of testimony necessary.—The nature of the proceeding of setting down a cause for hearing upon bill and answer is historically a test of the sufficiency of the defenses in the answer, as has already been pointed out; but that was early obliterated in Alabama by rules of practice now abolished which spoke of the proceeding as one by consent based

[15] The reason why responsive statements upon information and belief should be taken as true is that the defendant has no chance to prove them. Such statements were not evidence upon a hearing upon bill answer and testimony because the defendant then had his chance to prove them. Agnew v. McGill, 96 Ala. 496.

[16] Wynn v. Rosette, 66 Ala. 517; Keiffer v. Barney, 31 Ala. 191.

[17] Buchanan v. Buchanan, 72 Ala. 55; Zelnicker v. Brigham, 74 Ala. 598; Thorington v. City Council of Montgomery, 88 Ala. 548.

[18] Bostick v. Jacobs, 141 Ala. 598; Speakman v. Vest, 46 So. Rep. 667.

upon admissions by the parties.[19] Consequently it is not surprising that the memorandum of testimony made out by the register in cases submitted upon bill, answer, and proofs[20] is necessary when the cause is set down upon bill and answer only. The memorandum will contain nothing but the bill and the answer; but apparently they must both be noted, and the answer should be noted as testimony for the plaintiff as well as for the defendant.[21]

§ 520. Additional proceedings after the hearing.—Of course it is contemplated that a submission upon bill and answer dispenses with the necessity of taking testimony, as that is the primary purpose of the proceeding. But it sometimes happens that the answer may admit sufficient matter of the bill for the plaintiff to be entitled to a decree upon its equities, and yet have other rights which can only be determined by collateral testimony. Thus in a suit for the settlement of a partnership, the answer by admitting the partnership entitled the plaintiff to a decree; and yet both parties were entitled to take testimony to show the nature of the partnership, and were entitled to a reference to settle the accounts. And although the cause was set down for hearing upon bill and answer, and went to the Supreme Court, it was remanded to allow these additional proceedings.[22]

§ 521. Amendment after the proceeding.—And in such cases it is important to note that on the remandment of the cause the defendant may be able to amend and strike out from his answer the very admissions upon which the former submission and decree were based.[23]

[19] See former Chancery Rule 14, adopted in 1841, published in the front of 2 Ala. And see Forrest v. Robinson, 2 Ala. 215.

[20] Chancery Rule 76, Code of 1907.

[21] Speakman v. Vest, 46 So. Rep. 667; Wynn v. Rosette, 66 Ala. 517.

[22] Speakman v. Vest, 46 So. Rep. 667.

[23] Speakman v. Vest, 46 So. Rep. 667.

CHAPTER XXI.

The Replication.

§ 522. The replication under English practice.—It seems that in early times the plaintiff replied in chancery to the defendant's answer, and set up by that method any necessary additional averments required by the answer, just as a plaintiff at law replies to a plea. So formerly the defendant in chancery might rejoin, just as at law. But long before the English practice in chancery was inherited by us, replications setting up new matter had fallen into disuse; new matter required in avoidance of the answer was set up by amendment of the bill, and additional matter to be brought forward by the defendant was introduced by amendment to the answer.[1] A formal replication survived, however, in order to put the cause at issue, and consisted in a mere denial of the truth and sufficiency of the answer as a bar of the plaintiff's suit and an assertion of the truth and sufficiency of the bill.[2]

§ 523. The replication abolished in Alabama.—In Alabama the late English method of amending the bill in order to set up affirmative matter in reply to the answer has always been accepted without any statute; and that is the only proper method in Alabama of avoiding matter in the answer.[3] The use of the replication as a general traverse, however, which survived under the English practice, was early abolished in Alabama by statute.[4] So that affirmative matter set up in defense should not be denied by amendment to the bill or by replication; and that whether it be set up in the answer,[5] or by separate plea.[6] "A replication, according to the English

[1] Story Eq. Pl. § 877, et seq.

[2] Story, id, § 878.

[3] Smith v. Vaughan, 78 Ala. 201; Am. Freehold Land Mtge. Co., v. Dykes, 111 Ala. 178.

[4] Now § 3121, Code of 1907.

[5] Forrest v. Robinson, 2 Ala. 215; Lanier v. Hill, 30 Ala. 111; Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178; Stein v McGrath, 128 Ala. 175.

[6] Tyson v. The Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder, 133 Ala. 620.

practice, * * * is intended merely to put in issue the facts stated in the answer which are considered as irresponsive allegations,"[7] that is to say, which are matters in defense;[8] and it is said that our statute abolishing this replication "silently makes up an issue upon the facts alleged in the answer,"[9] without any further denial on the part of the plaintiff.

§ 524. The taking of testimony is equivalent to taking issue. —Therefore when all the defendants have answered, and the plaintiff has nothing more to add to his bill, he begins to take his testimony in one of the methods provided by law; and this amounts to an indication that he has taken issue upon the allegations of the answer or of a plea.[10] And while this is not so hazardous at it was before the Code of 1907,[11] it is well for the plaintiff to delay taking his testimony until he has finally framed his bill to suit him.[12]

[7] Per Collier, C. J., in Fenno v. Sayre, 3 Ala. 458, 479.

[8] Immaterial affirmative allegations in the answer require no attention from the plaintiff. Stein v. McGrath, 128 Ala. 175.

[9] Per Ormond, J., in Forrest v. Robinson, 2 Ala. 215, quoted in Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178, 192, and in Tyson v. The Decatur Land Co., 121 Ala. 414.

[10] Tyson v. The Decatur Land Co., 121 Ala. 414; Johnson v. Common Council of Dadeville, 127 Ala. 244; Adair v. Feder, 133 Ala. 620.

[11] Sec. 3115, Code of 1907.

[12] Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178.

CHAPTER XXII.

The Taking of Testimony.

§ 525. Rules of evidence and competency of witnesses same as at law.—Although it is generally accepted that the rules of evidence are the same in chancery as at law, it seems never to have been laid down as a general proposition either by the English courts or by the Supreme Court of Alabama. It is provided by law in Alabama, however, that the competency of witnesses is the same in chancery as at law.[1]

But this work is not designed to cover so broad a field as the Alabama decisions upon evidence; and that subject will not be pursued further.

§ 526. Competency of parties as witnesses.—It is proper, however, to refer to the competency of the parties as witnesses, because their incompetency under the English practice had much to do with the importance of the answer under oath when it denied averments in the bill. The common law rule forbidding parties to a cause to testify has been limited by statute in Alabama, so that generally both parties and interested persons are competent witnesses, except in certain cases expressly named.[2] And those cases are, in brief, where the testimony relates to any transaction or conversation with a deceased person whose estate is interested in the suit, or when the deceased person occupied a fiduciary relation to the party against whom the testimony is offered. But if the testimony of the deceased person is already on file in the cause, or if it has been introduced by the opposite side, or if the witness is called to testify on the subject by the opposite side, the incompetency is removed.

And with reference to the incompetency of the testimony of parties within the exception, it must be noted that the taking of a decree pro confesso against them does not prevent their remaining parties to the cause, nor make their testimony competent under the statute.[3]

[1] Sec. 3142, Code of 1907.
[2] Sec. 4007, Code of 1907.
[3] Mobile Savings Bank v. McDonnell, 87 Ala. 736.

§ 527. The burden of proof.—As a rule the burden of proof in chancery is upon the plaintiff to prove his bill, and upon the defendant to prove his answer; but this is merely because they each rest their sides upon the affirmative matter set up in their respective pleadings. Except where special presumptions are provided by statute, the burden of proving matters at issue rests upon the party alleging the affirmative side of it;[4] and when either the bill or the answer contains a negative averment in connection with a claim or a defense, upon issue being taken, the burden is upon the opposite side.[5]

§ 528. The scope of testimony.—Primarily the scope of the testimony is the scope of the pleadings. After the final decree it not infrequently happens that a reference is had at which testimony is required outside the actual averments of the pleadings; but for the purposes of trying the cause, no testimony will be available beyond what is in support of the bill or the answer.[6] And the testimony must not fall short of the pleadings, at least to the extent that the equities are dependent upon them; for every important averment not admitted must be proved.[7] In short, the allegata and the probata must correspond.[8]

§ 529. Testimony not to be taken before cause is at issue.—Chancery Rule 49 provides that "testimony cannot be taken by either party until the cause is at issue by sufficient answer, or decree pro confesso, as to all the defendants"; and this seems to indicate that even those who had answered or against whom decrees pro confesso have been taken may object to testimony as taken prematurely when any other

[4] Hawes v. Brown, 75 Ala. 385; Wilkinson v. Searcy, 74 Ala. 243; Buchanan v. Buchanan, 72 Ala. 55; Lehman v. McQueen, 65 Ala. 570.

[5] Carroll v. Malone, 28 Ala. 521; Walker v. Palmer, 24 Ala. 358.

[6] Jones v. Peebles, 130 Ala. 269; Am. Freehold Land Mtge. Co. v. Dykes, 111 Ala. 178; Gilmer v. Wallace, 75 Ala. 220; Hooper v. Strahan, 71 Ala. 75; Floyd v. Ritter, 56 Ala. 356.

[7] Buchanan v. Buchanan, 72 Ala. 55; Thorington v. City Council of Montgomery, 88 Ala. 548; Barton v. Barton, 75 Ala. 400.

[8] Cocciola v. Wood-Dickerson Supply Co., 152 Ala. 283; Alston v. Marshall, 112 Ala. 638; Clemmons v. Cox, 116 Ala. 567; Machem v. Machem, 28 Ala. 374.

defendant has not answered or suffered a decree pro confesso.[9] It was held in Dailey v. Reid[10] that testimony prematurely taken was bad as to the defendant not properly before the court; but the principal point of the case was that where the person who had not answered was an infant, no motion to suppress the testimony was necessary on his part; so the suggestion that it might be good as to the other defendants is probably not law. The sense of the rule is based upon the theory of possible interrelation of equities between co-defendants, so that it would be dangerous to recognize testimony as good against one without being good against all.

Irregularities in taking testimony may be waived, however, by the several parties,[11] apparently even though the party waiving is an administrator; and in the event of the waiver by the party not properly before the court, it would seem to prevent objection to the defect by the others.[12]

§ 530. Testimony properly taken after issue not affected by subsequent acts of defendants.—If any defendant has suffered a decree pro confesso to be taken against him, he is not entitled to any notice of the taking of testimony in the cause, Chancery Rule 61 relieving from compliance as to him with the requirements as to notice of time for taking and service of copies of the interrogatories. And since the testimony so taken after a decree pro confesso against a defendant is properly taken at the time, although ex parte,[13] nothing which that defendant may subsequently do in the way of relieving himself of contempt by setting aside the decree pro confesso and filing an answer will invalidate the testimony already taken. "If such an effect were given to the answers, then the neglect or caprice of the defendants might occasion expense or inconvenience to the complainant, and perhaps injury * * * The correct practice in such case would be, upon the decree pro confesso being set aside, for the defendants who

[9] Henderson v. Hall, 134 Ala. 455, 512; Harris v. Moore, 72 Ala. 507.

[10] 74 Ala. 415.

[11] Henderson v. Hall, 134 Ala. 455, 512.

[12] Reynolds' Admr. v. Pharr, 9 Ala. 560.

[13] Atkisson v. Atkisson, 17 Ala. 256; Jordan v. Jordan, 17 Ala. 466.

filed answers to move upon a proper showing for leave to take the depositions of the same witnesses at the defendant's instance, and a commission could issue on such terms as would amply protect the complainant."[14]

Upon the same principle where a party dies after testimony has been properly taken or where a party assigns his interest in the subject-matter of the suit, upon the revival of the cause or the admission of the successor in title, the testimony does not have to be retaken.[15]

§ 531. When testimony is to be taken.—The statutes and rules do not provide when testimony must be taken, but only when it may be taken. "The plaintiff may take testimony at any time after answer or after a decree pro confesso and the defendant at any time after filing his answer."[16] And of course the same law applies to testimony upon pleas.

But if the testimony has not been taken by the time the cause is regularly called for a hearing, "application for continuance for want of testimony must be in writing, and conform to the rule in regard to the continuance of trials in the courts of law."[17] And "no application for a continuance for want of testimony must be considered, unless the equity of the bill is admitted, until the question of equity is disposed of, by way of motion to dismiss for want of equity,[18] or, if there is a demurrer to the bill, by decision on the demurrer."[19]

§ 532. How testimony is taken.—The taking of testimony in chancery in Alabama is governed entirely by statutes and chancery rules promulgated by the Supreme Court and recognized in the Code. Two methods are provided, the old English method of written interrogatories and answers taken down by an officer, and the common law method of oral questions and answers; but the latter is also conducted before an officer and the testimony is submitted in writing to the court.

[14] Per Collier, C. J., in Planters' & Merchants' Bank v. Walker, 7 Ala. 926, 952.

[15] Wells v. Am. Mtge. Co., 109 Ala. 430.

[16] Sec. 3143, Code of 1907.

[17] Chancery Rule 70, Code of 1907.

[18] See § 404, ante.

[19] Chancery Rule 71, Code of 1907.

"Either party may require witnesses residing within the state to be examined orally, instead of by interrogatories"; and "such examination may be taken before the register, or before an examiner appointed by the court, or by a special commissioner of the appointment of the register, as the applicant may desire."[20] And in all other cases testimony must be taken upon written interrogatories under the rules in force.[21]

§ 533. Either party may require oral examination of any witness.—Moreover the above provisions are not to be understood as giving each of the parties the right of determination as to the mode of taking the testimony of his own witnesses. The rules of practice make it clear that although a party has decided to propound to his witness written interrogatories, the other party may demand that the examination of the witness be oral.[22] But of course that does not prevent either party from writing out his questions with care and reading them off to the witness, instead of questioning him ex tempore.

§ 534. Relative value of the two methods.—The relative value of the two methods may be different in each case and with respect to the testimony of each witness. The examination upon written interrogatories is a survival of the old chancery practice in England, and has its origin in the system of procedure in the ecclesiastical courts and in the canon law and the civil law.[23] A tendency has grown up therefore to regard the method as a fossil, not adapted to the demand of modern times for brevity and directness of procedure. But the fact that the practice is of remote origin does not prevent its having special advantages and uses. In a complicated case where the pleadings are long and the equities involved, the court often holds its decision long in its bosom; and undoubtedly carefully prepared interrogatories directed to each point of the bill and answer, conduce to the keeping of the case fresh in the mind of the court, and aid it in discriminat-

[20] Sec. 3139, Code of 1907.
[21] Sec. 3141, Code of 1907.
[22] See Chancery Rule 65, subdivision (3).
[23] Langdell Eq. Pl. § 47; Story Eq. Pl. § 39.

ing between truth and error. On the other hand in a simple case, dependant upon one point, the opportunity to dispense with forms and submit a short concise statement of the witnesses' testimony, is a distinct aid to justice.

So when the witness is uneducated or timid his mind will usually be kept clearer by the opportunity to hear the questions read slowly, and to collect his thoughts without the distress of cross-examination. Therefore his responses will be more accurate to written interrogatories, and the party introducing him should resort to that method. But if the facts are uncertain, or if the occasion to be described is long past, so that details may conflict, it is safer even with timid witnesses to take testimony orally in order to correct by repeated questions the inaccuracies of the testimony.

But the chief value of oral examination is to the opposing side. No one can deny that the opportunity of testing a falsifying witness by a skillful face to face cross-examination is worth all the oaths of the present day or of the past. And yet when intentional falsification is not feared, it is often to be preferred that accurate answers be obtained to searching cross-interrogatories.

Therefore neither plan is to be always recommended; the careful solicitor will consider for every witness the advantages of each. But whichever be selected, let there be a reason for it; and too severe condemnation cannot be made of the selection of the oral method merely because of the trouble thereby saved to solicitors.

§ 535. The testimony to be taken by commissioners.— Whether testimony is taken upon oral or written interrogatories, it is taken before one or more commissioners or examiners appointed by the register for the purpose, and acting under authority of a commission made returnable with all convenient speed.[24] The commissioner is an officer of the court in carrying out the commission,[25] and may issue subpoenas for witnesses and administer oaths to them;[26] and the sheriff must execute his subpoenas.[27] So of course the

[24] Sec. 3146, Code of 1907.

[25] See Chancery Rule 65, Code of 1907; Potier v. Barclay, 15 Ala. 439.

[26] Sec. 3151, Code of 1907.

[27] Sec. 3152, Code of 1907.

commission must not be made out in blank for the name of the commissioner to be inserted later.[28]

The chancellors have power to appoint standing commissioners to act as examiners when the parties do not request special commissioners;[29] and the register may act as commissioner when the party filing written interrogatories appoints the register to so act by an indorsement upon the interrogatories of his selection;[30] and when the examination is oral, apparently the register may act as commissioner upon either the oral or written request of the applicant.[31] When a general commissioner acts or when the register acts no special commission is required.[32]

§ 536. Duties of Commissioners.—Besides summoning and swearing the witnesses, the commissioner should take down the answers of the witnesses accurately and separately, even though the same question be propounded to several witnesses.[33] He should read over to each witness his testimony as written, before allowing him to sign it, and he should then make out and sign a certificate that the deposition was taken and the witness sworn and examined by him pursuant to the commission. The commission, the interrogatories, the caption of the answers, and the certificate all go to make up the return; and "the return is prima facie entitled to full faith and credit."[34]

"Depositions taken upon oral examinations shall be taken down in writing by the examiner in the form of a narrative, unless some question is raised on the legality or pertinency of the interrogatory, or on the legality or sufficiency of the answer," when the objection must be noted, or upon the request of either party, fully set forth; and questions objected to must be fully set out.[35] Moreover it is provided when the examination is oral that if the witness refuses to sign the

[28] Worsham v. Goar, 4 Porter, 441.

[29] Sec. 3139, Code of 1907; Chancery Rule 59.

[30] Sec. 3150, Code of 1907.

[31] Sec. 3139, 3140, Code of 1907.

[32] Sec. 3150, Code of 1907; Chancery Rule 59.

[33] Jordan v. Jordan, 17 Ala. 466.

[34] King v. King, 28 Ala. 315.

[35] Chancery Rule 65, subs. (6) and (7).

deposition the examiner must state the fact in his certificate.[36]

The deposition when completed shall be sealed up by the commissioner together with the commission, the interrogatories, and the certificate. The envelope must then be endorsed with the title of the cause and the names of the witnesses, and the package must be directed to the register at the proper place.[37]

If errors be made in the return, commissioners may correct their returns or amend their certificates later, provided they do so in open court;[38] but of course irregularities can always be waived by parties not subject to disabilities.

§ 537. Commissioner not a judge.—It must not be supposed, however, that the commissioner is in any sense a judicial officer. He is not authorized to pass upon the competency of testimony, but must note objections and exceptions for decision by the chancellor.[39] And he cannot commit for contempt or refusal of a witness to testify; but it is made the duty of any chancellor or circuit judge to commit a defaulting witness on the certificate of the commissioner, issued at the request of either party.[40]

§ 538. Notice of choice of commissioner.—When a party files interrogatories to a witness, he is required to give the name of the commissioner if he desires a special commissioner to be appointed to take the testimony; and it then becomes the duty of the register to issue notice to the opposing party of the filing of the interrogatories and the name of the commissioner,[41] which shall be served upon him; and he then has an opportunity to object to the commissioner, or to the register if the register is appointed to act as commissioner. But when the examination is to be oral, the notice is not required to give the name of the commissioner selected by the applicant;[42] so unless the opposing party or his solicitor

[36] Ibid.

[37] Chancery Rule 62, Code of 1907.

[38] Wolfe v. Underwood, 97 Ala. 375; Dunlap v. Hartin, 49 Ala. 412.

[39] Elyton Land Co. v. Denny, 108 Ala. 553; Chancery Rule 65.

[40] Sec. 3156, Code of 1907; Ex parte Rucker, 108 Ala. 245.

[41] Chancery Rule 58; § 3147. Code of 1907.

[42] Chancery Rule 65, § 3140, Code of 1907.

is present at the examination, he may not know the name of the commissioner until the hearing. In such event he may object to the competency of the commissioner at the hearing of the cause; but it is then too late to do so if he was aware earlier of the commissioner's incompetency.[43]

§ 539. Notice of filing interrogatories.—When a party is ready to take his testimony, if he desires to take it upon written interrogatories, or if he desires to take the testimony of some of his witnesses upon written interrogatories, he prepares his interrogatories to the witness or witnesses, setting forth their names and residences, and files them with the register. But section 3147 of the Code provides that no commission to take the testimony shall issue until the opposite party or his solicitor shall have been served with notice, if either resides in the district, and until ten days after such notice shall have elapsed; and that during that period the opposite party may obtain a copy of the interrogatories, to be taxed as costs in the cause, by applying to the register for them. Chancery Rule 50 requires, however, that the opposite party shall be served with a copy of the interrogatories as well as with notice of their having been filed, referring to section 3147. So an apparently unintentional conflict is occasioned.

The Code of 1907 provides elsewhere that "All the rules now in force which have been adopted by the Supreme Court, not contrary to the provisions of this Code are recognized;"[44] and of course that makes it clear that section 3147 shall be followed rather than Rule 50. But section 3147 does not provide by whom the opposing party shall be served with notice; and since the sections of the Code providing for the taking of testimony by deposition in courts of common law require the notice and copy of interrogatories to be given to the opposing party by the party himself and not by the sheriff or the clerk of the court,[45] grave doubt arises how the notice and copy of interrogatories must be served in chancery.

Of course defects are usually waived, but to be safe, especial-

[43] Colgin v. Redman, 20 Ala. 650; Jordan v. Jordan, 17 Ala. 466.

[44] Sec. 3227, Code of 1907.

[45] Sec. 4032, Code of 1907.

ly where infants are parties, the best plan would seem to be for the party filing the interrogatories to take a copy of them, together with written notice of the date of their filing, to each of the opposite parties, or their solicitors, and have them accept service and waive further notice by indorsement upon the original interrogatories to be filed with the register.

If any party refuses to waive further notice, he should be served by the sheriff with notice of the filing and the names of the commissioner and of the witnesses;[46] and then having already been offered a copy of the interrogatories, he can obtain a certified copy from the register in accordance with section 3047.

§ 540. Cross-interrogatories.—The opposing party has ten days, unless he consents to a shorter time,[47] within which to file written cross-interrogatories to the witness, and to object to the commissioners suggested by the party calling the witness; but he may file them after that time and they will be allowed, provided the commission has not already been issued.[48]

The party filing the cross-interrogatories must also file notice in writing with his cross-interrogatories, if he desires to be present at the taking of the testimony; and the register must then prescribe in the commission what notice of the time and place he shall receive.[49]

§ 541. Rebutting interrogatories.—When cross-interrogatories have been filed, the party calling the witness is allowed five days in which to file rebutting interrogatories before the commission must issue.[50]

§ 542. Notice to non-residents of the district.—When the opposing party does not reside in the chancery district in which the cause is being tried, and he has not a local solicitor, the provisions as to serving notice do not apply; and notice is given him by the register by mailing the notice to the solicitor of record, directed to his place of residence; and the

[46] Chancery Rule 60, Code of 1907.
[47] Chancery Rule 61, Code of 1907.
[48] E. T. V. & G. R. R. Co., v. Watson, 90 Ala 41.
[49] Chancery Rule 51, Code of 1907.
[50] Sec. 3149, Code of 1907.

certificate of the register is prima facie evidence of the proper mailing of the notice. The party may then obtain a copy of the interrogatories by applying to the register. But the commission may issue ten days after the notice is mailed.[51]

§ 543. No notice to parties in default.—But no notice whatever shall be given to parties in default after decrees pro confesso have been taken against them, and they are not entitled to a copy of the interrogatories. Nor need the interrogatories lie over ten days before the issue of the commission.[52]

§ 544. Demand for oral examination.—The importance of complying with the various sections of the Code and rules with reference to notice is apparent when we recall that at the time of preparing and filing written interrogatories to a witness, the party has no way of knowing whether his interrogatories will be a part of the proceeding or not; for the opposing party has an absolute right to have any witness examined orally. But a rule provides that "In case interrogatories in writing to a witness are filed, and any party to the cause shall require the examination of such witness to be taken orally, he shall give the other parties to the cause, or their solicitors, notice of such requirement within five days after notice of the filing of such interrogatories, or on failure to give such notice shall be held to have waived the right to any oral examination."[53]

§ 545. Notice of oral examination.—The rules governing the taking of testimony upon oral examinations, when that method is at first chosen by the party calling the witness, are considerably different from the rules governing the propounding of written interrogatories. The party desiring to call a witness for oral examination, shall first file his request in writing with the register.[54] The register must then give notice to the opposite party, or his solicitor of record, if either resides within the district; and apparently this notice may be served

[51] Sec. 3148, Code of 1907.

[52] Chancery Rule 61, Code of 1907; Atkisson v. Atkisson, 17 Ala. 256; Jordan v. Jordan, 17 Ala. 466.

[53] Chancery Rule 65, sub. (3), Code of 1907.

[54] Chancery Rule 65, sub. (2) Code of 1907.

by the register personally, or by the sheriff.[55] If the party and his solicitor are both non-residents of the district, notice upon the order book is sufficient.[56] But the party calling the witness and requiring an oral examination must also give notice in writing to the opposite party of his having done so, at least three days before the examination is taken.[57] The register or examiner or special commissioner who is to take the testimony, must also fix by order a reasonable period of notice to the opposing party of the time and place of the examination, and this also must be given in writing by the solicitor of the party calling the witness to the opposite party.[58]

The examination is then conducted in the presence of the parties or their agents by their solicitors in general conformity to the method of examining witnesses in courts of law, but the commissioner shall not pass upon the legality of a question or the sufficiency of an answer, but must note the objections or exceptions for consideration by the court. And in case any party is absent, after being duly notified, the examination may proceed without him.[59]

§ 546. Objections and exceptions.—Objections to written interrogatories must be made in writing before the filing of cross-interrogatories;[60] and when the examination and objections are oral, the commissioner should note the objections and upon request should write out in full both the questions objected to and the answers made to them, and note them upon the deposition.[61]

When the illegality of evidence is not revealed until the answer, of course it should be objected to at that time, if the objecting party is present at the taking, or at the hearing in the lower court if then first revealed. For the failure to object to evidence before the submission of the cause before the chancellor is a waiver of its illegality,[62] and objection

[55] Sec. 3140, Code of 1907.
[56] Ibid, and see Chancery Rule 65, sub. (1).
[57] Chancery Rule 65, sub. (2).
[58] Idem, sub. (4).
[59] Idem, Subs. (5) and (6).
[60] Binford v. Dement, 72 Ala. 491.
[61] Chancery Rule 65, sub. (6).
[62] Brewer v. Browne, 68 Ala.

cannot be raised for the first time in the Supreme Court on appeal.[63]

In assigning objections it is necessary to do something more than object indefinitely to an interrogatory or to the testimony as illegal;[64] and if part of an interrogatory is relevant and part is not, the objection must point out the irrelevant part or it will be overruled.[65] And it must be especially noted that objections to interrogatories or to evidence constitute merely an initial step to requiring the decision of the court later upon the admissibility of the testimony. "They are the predicate—a necessary predicate—for exceptions to be afterwards filed, but are not exceptions to be ruled on. Such exceptions are in writing signed by counsel, specify the portions of the testimony sought to be suppressed, and become a part of the file. And if the ruling on them or a failure to rule on them, is sought to be reviewed in [the Supreme Court,] they are a necessary part of the transcript. In this way [the Supreme Court] are informed that the chancellor's attention is called to them, and that they are insisted on in the court below."[66] And "if the fact that they have been made is not noted in the submission, or it is not otherwise shown that they were called to the attention of the chancellor, and he does not notice them, on appeal the presumption is that they were waived."[67]

When objections and exceptions are so taken, the chancellor should rule upon them before the hearing, or by consent at the hearing;[68] but if he fails to do so, it will not be regarded as error if his decree can be sustained upon other evidence to which no exception was taken.[69]

§ 547. Suppression of depositions. — The supression of entire depositions is a matter left largely to the discretion of

210; Perry County v. S. M. & M. R. R. Co., 65 Ala. 391; Masterson v. Pullen, 62 Ala. 145.

[63] Binford v. Dement, 72 Ala. 491; Jordan v. Jordan, 17 Ala. 466.

[64] Binford v. Dement, 72 Ala. 491; March v. England, 65 Ala. 275; Jordan v. Jordan, 17 Ala. 466.

[65] Borland v. Walker, 7 Ala. 269.

[66] Per Stone, J., in Binford v. Dement, 72 Ala. 491.

[67] Per Brickell, C. J., in Seals v. Robinson, 75 Ala. 363.

[68] Binford v. Dement, 72 Ala. 491.

[69] Meyer v. Mitchell, 75 Ala. 475.

the chancellor. If the motion for suppression be based upon want of proper notice,[70] or upon technical error in the commissioner's certificate,[71] the decision of the chancellor will not generally be reviewed.[72] Moreover the objection must be made at the earliest possible moment;[73] and in the absence of the breach of some positive rule, must show that injury has been done.[74] But if cross-interrogatories are clearly evaded, and the testimony on the direct examination does not substantially answer them, and motion was properly made at the hearing to suppress the entire deposition, on appeal the cause will be reversed and remanded for failure to do so.[75]

§ 548. Other methods of proof.—Evidence by admissions in the answers has already been sufficiently treated in discussing the answer; but it is proper to note that for certain purposes ex parte affidavits are equivalent to proof. "Such affidavits are not evidence upon the merits of the cause," however, "but are used merely to enlighten the mind and conscience of the court, upon questions calling for action in advance of legal testimony."[76]

Such are hearings upon motions to dissolve injunctions, to remove or appoint receivers, and applications to enjoin waste.[77]

§ 549. Proof of exhibits.—Another special method of proof is provided for exhibits. "Exhibits to bills and answers may be proved by affidavits filed with the exhibits in the register's office thirty days before the hearing."[78] But of course that does not apply to deeds and other writings made exhibits which are self proving by any other rule.

§ 550. Oral testimony at the hearing.—It is also within the power of a court of chancery to hear oral testimony;[79] and

[70] Nelms v. Kennon, 88 Ala. 329.

[71] Bickley v. Bickley, 136 Ala. 548.

[72] Walker v. Smith, 28 Ala. 569.

[73] Harris v. Miller, 30 Ala. 221.

[74] Goodrich v. Goodrich, 44 Ala. 670, 681. The case held it not ground for suppressing the deposition that the witness had been allowed copies of the interrogatories and cross-interrogatories before his testimony was given.

[75] Electric Lighting Co. of Mobile v. Rust, 131 Ala. 484.

[76] Per Coleman, J., in Henry v. Watson, 109 Ala. 335.

[77] Ibid. And see Long v. Brown, 4 Ala. 622, 631.

[78] Sec. 3144, Code of 1907.

[79] Kennedy v. Kennedy, 2 Ala. 571, 626.

jury trials at which the evidence is heard as in the trials at law, are recognized by the Code to determine issues of fact at the discretion of the chancellor, instead of referring them to the circuit court.[80] Moreover Chancery Rule 64 recognizes the right to prove exhibits and documents viva voce at the hearing upon giving one day's notice to the opposite party.

§ 551. Interrogatories to the parties.—Finally it is provided that either party may examine the other party after the answer is filed upon the matters at issue in the cause, by filing interrogatories as to other witnesses. But it is especially provided that the party taking his opponent's testimony need not introduce the deposition unless he sees fit to do so; and even if he elects so to do, he can offer other testimony to contradict it.[81]

[80] Sec. 3201, et seq., Code of 1907.

[81] Sec. 3134, et seq., Code of 1907.

CHAPTER XXIII.

Dismissals.

§ 552. Dismissal for failure to bring in defendant.—The plaintiff will not be allowed to file a bill and pay no further attention to his suit. If he "shall not before the second term after the filing of the bill, have taken measures to bring in the defendant, his bill may be dismissed" by the court of its own motion.[1]

§ 553. Dismissal at plaintiff's instance.—Nor will the plaintiff be allowed always to dismiss his own bill without prejudice. If he make application before the defendant has filed a plea or an answer, it seems that he is entitled to the motion;[2] but even then he should be careful to have the decree recite that the dismissal is without prejudice.

If, however, plea or answer has been filed and the cause has been set down to be heard, so that the court is in a position to determine its equities, the plaintiff is probably not entitled to have the suit dismissed without prejudice;[3] that is, unless it is clear that the defendant can be made whole by payment of costs, or will not be greatly inconvenienced if the suit be renewed. As said by Mr. Justice Dowdell in Ex parte Jones,[4] "As a general rule a plaintiff has a right to dismiss his suit, whenever he elects to do so. But this rule has its exceptions. It seems that a plaintiff may not as a matter of right dismiss his suit when the respondent has acquired rights in the proceedings by answer or cross-bill,

[1] Chancery Rule 27, Code of 1907.

[2] Burgess v. Am. Mortgage Co., 119 Ala. 669.

[3] Chancery Rule 28, Code of 1907. And see Burgess v. Am. Mortgage Co., 119 Ala. 669, and Howard v. Bugbee, 25 Ala. 548. Chancery Rule 28 took effect after the court in Howard v. Bugbee decided that the 117th order in English Chancery adopted May 1845, from which the 28th. Alabama rule was later copied, did not apply in Alabama. Chancery Rule 28 in the Code of 1907 is not correctly copied from the Code of 1896, however, as there is an omission, evidently through error of the printers.

[4] 133 Ala. 212.

and would be prejudiced by such dismissal." In that case the cross-bill did not contain equity apart from the bill and would have fallen out had the bill been dismissed; and a claim set up in the cross-bill would then have been barred by statutes of limitation.

§ 554. Orders of dismissal by register.—It is provided in the Code[5] that the plaintiff may have his bill dismissed upon application to the register in vacation. If no answer nor cross-bill has been filed, apparently it may be done as of course; for the register is required to enter the order of dismissal, and may issue execution against the plaintiff for all costs accrued in the cause. But if the defendant has filed an answer or a cross-bill, the register must enter the order of dismissal; but the defendant may, at the next succeeding term of the court, show cause against the dismissal, and procure a vacation of the order.

This provision does not conflict with the theory above announced; for the register's order is subject to review by the chancellor, and he is supposed to protect any right of the defendant to have the cause proceed.[6]

The only other dismissal without considering the merits of the bill is a dismissal for the want of prosecution, and that involves a call of the cause for a hearing, and will be taken up in the next chapter.

[5] Sec. 3123, Code of 1907.

[6] Ex parte Jones, 133 Ala. 212.

CHAPTER XXIV.

The Hearing and Submission of the Cause.

§ 555. The docket, and the calling of the cause.—The register in chancery is required to keep a docket upon which all the causes in his court must be listed in the order in which the original bills are filed.[1] Every proceeding in the cause and every paper filed is listed upon this docket, and each cause has one permanent number, which is marked on all the pleadings, orders, and papers filed in it.

From this docket the causes are called in succession peremptorily for hearing at each term; but where the term is more than one week this is not done on the first day, that being reserved for consent orders and submissions upon decrees pro confesso.[2]

§ 556. Continuances.—When a cause is peremptorily called for hearing after the defendant has filed his answer, it is the duty of both parties to be ready, if they have had time within which to be so; but if either party is not ready, and the other party will not consent to a continuance, he makes application to the court to allow it. Application is usually made orally in open court; but "application for continuance for want of testimony must be in writing, and conform to the rule in regard to the continuance of trials in the courts of law";[3] and "no application for a continuance for want of testimony must be considered unless the equity of the bill is admitted, until the question of equity is disposed of."[4]

In all other instances the granting or refusal of a continuance is discretionary with the chancellor, and will not be reviewed on appeal.[5] And the chancellor may impose con-

[1] Chancery Rule 66, Code of 1907.

[2] Section 3206, Code of 1907.

[3] Chancery Rule 70, Code of 1907.

[4] Chancery Rule 71. The rule continues as follows, "by way of motion to dismiss for want of equity, or, if there is a demurrer to the bill, by decision on the demurrer;" and this has been discussed in §§ 404, 418, ante.

[5] Evans v. Bolling, 5 Ala. 550; Planters' & Merchants' Bank v.

ditions for allowing it, such as the payment of full costs, or the execution of a good bond for the payment of any money decree which may be rendered in the cause.[7] But if he grants a continuance upon conditions, and the conditions are oppressive, the terms and conditions may be reviewed by the Supreme Court, although the allowance itself cannot be.[8]

§ 557. Failure of parties to appear at hearing: defaults.—"When a cause is called for hearing, if the complainant does not appear, it shall be dismissed; if he appears, and the defendant does not, it shall be heard and decree rendered according to the claim and proof."[9] But a decree rendered upon failure of either party to appear, may be set aside upon such terms as the chancellor may impose, provided application is made at the term at which the decree was rendered;[10] but in the Jefferson County Chancery Court, probably only if application is made within thirty days.[11]

§ 558. When dismissal amounts to decree on merits.—When the suit is dismissed for want of prosecution by the plaintiff, and the decree is not set aside, as above indicated, within the propor time, the dismissal may amount to a decree upon the merits unless the decree of dismissal especially provides that it be without prejudice.[12] The theory upon which the Supreme Court has acted is that when issue has been joined, that is, when a plea or an answer has been filed, the chancellor could have decided upon the equities of the cause but for the plaintiff's default, and therefore the dismissal should be upon the merits.[13] Hence it would seem that if the defendant had

Walker, 7 Ala. 926, 951; Thorington v. City Council of Montgomery, 94 Ala. 266.

[6] Rhea v. Tucker, 56 Ala. 450.

[7] Dudley v. Witter, 51 Ala. 456.

[8] Dudley v. Witter, 46 Ala. 664, 696.

[9] Chancery Rule 69, Code of 1907.

[10] New Eng. Mortgage Sec. Co. v. Davis, 122 Ala. 555.

[11] Local Acts of Ala., 1898-'99, 1213. This act places "final decrees" beyond the control of the Jefferson Chancery Court after thirty days. The Acts creating City Courts and Law and Equity courts usually have similar provisions. These acts are cited in Appendix B, post.

[12] Chancery Rule 28, Code of 1907.

[13] Ex parte Gist, 119 Ala. 463; Burgess v. Am. Mortgage Co.,

filed a demurrer only, the plaintiff might file another suit upon the same claim.

Moreover it would follow as a corollary from that holding that a cause should not be set down for hearing, or called at the peremptory call of the docket, unless a plea or an answer has been filed.[14]

§ 559. The publication of the testimony.—As has already been noted in discussing the duties of the commissioner before whom the testimony is taken, the testimony when taken is sealed up by the commissioner, marked with the title of the cause and the names of the witnesses and forwarded to the register for safe keeping until the hearing. The first step at the hearing, therefore, is to publish or open the testimony, if it has not already been done by consent or by prior order of court or of the register in response to an application by a party made at an earlier time. And Chancery Rule 63 provides that "when testimony is published, the register shall withdraw the same from the envelopes, and indorse the title of the cause, with the names of the witnesses, and by which party examined, upon the back of the depositions," and whether it was published by order of court, or of the chancellor, or of the register, or by consent of the parties. The testimony then becomes part of the file.

At whatever time the testimony is published, however, the consequence is that "after publication passed, no testimony shall be taken except by consent, or by special application to the chancellor and allowance by him."[15] And the chancellor will not exercise his power for the taking of merely cumulative additional testimony, nor will he allow the alteration or correction of the testimony on a point which has been "critically discussed in court and the bearing and effect of every part of it understood and judicially settled."[16] But the application is "addressed to the sound discretion of the chancellor, and it is often granted to correct some inadvertent or other defect

119 Ala. 669; Warrior River Coal & Land Co. v. Ala. State Land Co., 45 So. Rep. 53.

[14] New Eng. Mortgage Sec. Co. v. Davis, 122 Ala. 555.

[15] Chancery Rule 62, Code of 1907.

[16] Harrell v. Mitchell, 61 Ala. 270; Eureka Co. v. Edwards, 80 Ala. 250.

in the evidence, or where there has been an omission to prove a writing, or even a particular fact upon which the case depends."[17]

Moreover the limitation applies whether the testimony is published before or at the hearing, and to the re-examination of witnesses already examined; but it does not effect the right of the court to request additional testimony for its own information after the submission.[18]

§ 560. Procedure at the hearing.—"On the hearing of the cause, the court can dispense with the reading of the pleadings and proofs; and in that case, the complainant's counsel must state the case made by the bill, and the defendant's counsel the defense made by the answer. The complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony, of which the register must take a note, and then that of the defendant must be offered, and noted by the register; to which the complainant, in like manner, must offer his rebutting testimony."[19]

It is provided by a Rule that "counsel on either side, in the course of their arguments, can read any portion of the pleadings or proofs;"[20] but of course this refers to their argument only. It must not be understood to mean, for instance, that the defendant may read his answer as evidence at a hearing upon pleadings and proofs.[21] Nor are they supposed to read any testimony not already noted by the register.

§ 561. The note of testimony.—It has been provided by a Rule that any testimony not offered in the routine above described "and noted by the register in the minutes, must not be considered as any part of the record, nor be considered by the chancellor."[22] And another Rule provides that "The register shall enter on the minutes of the court a memorandum of the testimony offered by each party on the hearing of a cause, a copy of which shall be filed for the use of the chan-

[17] Per Sommerville, J., in Gordon v. Tweedy, 74 Ala. 232.

[18] Dixon v. Higgins, 82 Ala. 284.

[19] Chancery Rule 75, Code of 1907.

[20] ibid.

[21] See § 495, ante.

[22] Chancery Rule 75, Code of 1907.

cellor."[23] And the Supreme Court has said that, "These rules are both mandatory and prohibitory. They command that all testimony offered by the parties be noted by the register, and entered on the minutes, and prohibit the consideration of any testimony not so offered, though it may be among the papers in the cause."[24] And even if a cause has been once submitted with a proper note of testimony, setting aside the submission destroys the note of testimony, and at the second submission a new note must be prepared; "unless the parties by agreement substitute the former note, which agreement should appear on the record." And the absence of a memorandum cannot be cured by intendment "from the recital of the decree that the 'cause was submitted on pleadings and testimony' that it was submitted on the testimony noted on the vacated submission."[25]

The note and minute memorandum must even embrace the bill and the answer in order that they may be relied upon as evidence or admissions.[26] And when exceptions have been filed to testimony, the exceptions also should be noted in the register's note and memorandum.[27]

The rules probably apply, too, to hearings before the register on reference; for on exception to the register's report no testimony can be considered but what has been noted by the register as relied upon at his hearing.[28] But at the submission before the chancellor upon the register's report and exceptions thereto, no note of that submission is necessary.[29]

The note should not attempt to contain the evidence itself, even where oral testimony is submitted at the hearing; it should merely recite the depositions and other matter offered in evidence; and oral testimony should be written out and then noted as having been offered orally.[30]

[23] Chancery Rule 76, Code of 1907.

[24] Per Clopton, J., in Reese v. Barker, 85 Ala. 474. And see Tatum v. Yahn, 130 Ala. 575.

[25] Reese v. Barker, 85 Ala. 474.

[26] Rice v. Tobias, 83 Ala. 348; Goodloe v. Dean, 81 Ala. 479.

[27] Seals v. Robinson, 75 Ala. 363.

[28] Mahone v. Williams, 39 Ala. 202.

[29] Whetstone v. McQueen, 137 Ala. 301, 316.

[30] Harn v. Common Council of Dadeville, 100 Ala. 199.

The purpose of the note is to identify the matter to be considered in determining what of the pleadings have been sustained; and so the note is unnecessary at submissions upon bills and decrees pro confesso;[31] and for the same reason it is unecessary at submissions for interlocutory orders such as applications for receivers and applications dissolving injunctions.[32]

§ 562. The submission.—The submission is the act of turning the cause over to the chancellor for his decision after the hearing. It is not necessary, however, that there be a hearing, or that the cause be argued in order to a submission. At the call for motions each morning of the term any cause may be submitted for decree without argument unless objection is made. But when a cause is submitted without argument, the testimony must be offered and noted, just as when the cause is heard.[33]

It is rare that the chancellor renders his decision at the time the cause is submitted to him. He usually prefers to study the pleadings and testimony for himself, and to render the decree later.

§ 563. After submission record cannot be changed unless the submission is set aside.—After the cause has been submitted to the chancellor proceedings in it are closed until the rendition of the decree; and if anything has been omitted, or if anything should be added to the record as it stands, the submission must first be set aside before the record can be changed. Thus it is error to allow a plea to be filed by way of amendment to the answer after the cause has been submitted, unless the opposing party consents. The defendant probably has the right to amend until the rendition of a final decree; but he must first have the submission set aside upon due notice.[34] And even the verification of the answer cannot be amended against the plaintiff's objection, without

[31] Jones v. Beverly, 45 Ala. 161.

[32] Jackson v. Hooper, 107 Ala. 634.

[33] Chancery Rule 77, Code of 1907.

[34] Wilkinson v. Buster, 115 Ala. 578; Ex parte Ashurst, 100 Ala. 573, 579.

involving the opening up of the cause by setting aside the submission and submitting over again.[35]

§ 564. Chancellor may set aside submission at his discretion.—And whatever may be the right of the parties under the statute of amendments to have the submission set aside, it is certain that the chancellor has the right to set the submission aside, for any reason that appeals to his discretion, and his act will not be reviewed.[36] Thus, he may set aside to restore depositions which had been suppressed;[37] or he may set it aside to take additional testimony when necessary to inform the conscience of the court, without regard to the limitations upon the parties' right to take additional testimony after the hearing.[38] And he may even set the submission aside to allow the taking of additional testimony upon the application of one of the parties when in his judgment it is necessary to justice.[39] And of course the chancellor can set it aside on his own motion to allow the addition of a necessary party.[40]

Therefore the new provision in the Code of 1907, giving the chancellor power in the furtherance of justice to "set aside the submission for the purpose of amendment, or taking further testimony,"[41] is largely declaratory of our existing practice.

§ 565. Chancellor must set aside submission upon death of a party.—Finally in one particular case, the chancellor has no choice but to set aside a submission; and that is where a party dies after the submission and before his decree. The heirs being necessary parties the decree will be invalid without them, and that without the fault of the omission being chargeable to the plaintiff.[42] The rule does not apply to causes in the Supreme Court, however; since the parties have then had their day in court.

[35] McMinn v. Karter, 116 Ala. 390.

[36] Jones v. White, 112 Ala. 449.

[37] Magruder v. Campbell, 40 Ala. 611.

[38] Dixon v. Higgins, 82 Ala. 284.

[39] Yeend v. Weeks, 104 Ala. 331.

[40] Marshall v. Shiff, 130 Ala. 545.

[41] Section 3212, Code of 1907.

[42] Powe v. McLeod, 76 Ala. 418; Ex parte Massie, 131 Ala. 62.

CHAPTER XXV.

Final Decrees.

§ 566. Importance of distinguishing final and interlocutory decrees.—When a cause has been submitted to the chancellor upon bill, answer, and testimony, or upon bill and decree pro confesso, for his decision as to the equities involved, if the decree which he renders determines the equities it is called a final decree, and if it does not determine the equities, it is called an interlocutory decree. While every decree is therefore either a final decree or an interlocutory decree, it is not necessarily the one or the other according as it ends or does not end the cause, as the terms would imply. The significance of the terms and the importance of the distinction between final decrees and interlocutory decrees lie in the interpretation of the sections of the Code authorizing and limiting appeals to the Supreme Court from final and interlocutory decrees respectively by parties who believe the decisions erroneous.[1]

We have seen in Chapter XVIII that some decrees interlocutory in their nature are binding beyond the right of appeal after a much shorter time than final decrees; and so the character of a decree has not infrequently required the decision of the Supreme Court as a preliminary to correcting what were believed to be errors in the determination of rights. Moreover, since not every final decree ends the cause, and since most final decrees cannot be appealed from after six months from their rendition,[2] it is not always possible at the end of a cause to take to the Supreme Court all the decisions of the chancellor made during its progress.[3]

§ 567. What is a final decree.—Chief Justice Brickell observed that the words "final judgment or decree" in the sections of the Code governing appeals "are not taken in their

[1] Secs. 2837, 2838, Code of 1907.

[2] Sec. 2868, Code of 1907. The exceptions are noted in Chapter XXVI, post.

[3] Cochran v Miller, 74 Ala. 50, 63; Alexander v. Bates, 127 Ala. 328.

strict technical signification, as importing a decree that conclusively and finally determines all the matters in controversy, and disposes entirely of the cause." He said that "The test of the finality of a decree, so as to support an appeal, which our decisions have prescribed, is not whether the cause is still in progress in the court of chancery, awaiting further proceedings which may be necessary to entitle the parties to the full possession and enjoyment of the rights it has been declared they have; but whether a decree has been rendered settling these rights."[4] This language has been repeatedly quoted, and as nearly embodies the definition of a final decree in Alabama practice as any which may be framed.

§ 568. Must a final decree settle all the equities?—The settling of equities, therefore, being the criterion by which to determine the character of a decree, rather than the ending of the cause, the question is presented, must a final decree settle all the equities between all the parties? or is the settling of one equity enough to make a decree final?

In the early case of the Bank of Mobile v. Hall[5] the Court cited Weatherford v. James,[6] and said: "It is there said that a decree 'is final when it ascertains all the rights of the parties in litigation,' although there may be a reference to the master to ascertain facts for an account between the parties." And the earlier case went on to say that "if the reference to the master had been for the purpose of ascertaining some fact on which to base a decree affecting the rights of the parties it would be interlocutory in its character." So in Garner v. Prewitt[7] it is said, "Is that a final decree which leaves open questions involving, so far as they go, the equities of the parties, even though as to all other matters the equities are ascertained and fixed? We are constrained to decide this question in the negative. That cannot be a final decree which settles only a part of the equities. If there are one hundred con-

[4] Jones v. Wilson, 54 Ala. 50. This was followed in Broughton v. Wimberly, 65 Ala. 549; Walker v. Crawford, 70 Ala. 567; Cochran v. Miller, 74 Ala. 50, and other cases; and is still law.

[5] 6 Ala. 141.

[6] 2 Ala. 170.

[7] 32 Ala. 13.

troverted questions of equity, a decree which settles ninety-nine of them, and leaves one undecided, is not a final decree."

This doctrine that all the equities must be decided has been reiterated many times since;[8] and the last case in which final decrees are discussed supports that view.[9] In Adams v. Sayre[10] Mr. Justice Somerville said: "It is a settled doctrine of this court, that, as a general rule, there can be but one final decree upon the merits of a chancery cause, which is required to settle all the equities litigated, or necessarily involved, in the issues of the particular suit. The policy of the rule is found in the indisposition of the appellate courts to multiply appeals, by undertaking 'to review litigated cases by piecemeal.'"

§ 569. Decrees of reference: when final.—It seems simple enough to determine when all the equities are settled, and yet not a few difficulties have arisen in doing so. One of the most troublesome has been in connection with decrees of reference. In Jones v. Wilson,[11] where Chief Justice Brickell held the decree final upon the merits, and considered the reference to the register as an ulterior proceeding "necessary only as a mode of executing it," the reference involved the ascertainment of the rents and profits to which the plaintiffs were entitled as well as to the equities of the bill. But in Walker v. Crawford,[12] where the bill sought to enforce a vendor's lien upon lands in the possession of subsequent purchasers, and the answer denied the lien, Chief Justice Brickell held that the decree of reference to ascertain whether the indebtedness existed, was merely interlocutory, although it also declared that the plaintiffs had a lien upon the land.

Later in Adams v. Sayre[13] the purpose of the bill was "to redeem certain mortgaged property, which had been sold under a power of sale contained in the mortgage;" and of course the whole equity of the bill was comprehended in the adjudged right of the plaintiff to redeem the mortgaged prem-

[8] Broughton v. Wimberly, 65 Ala. 549; Walker v. Crawford, 70 Ala. 567; Kimbrell v. Rogers, 90 Ala. 339; Marks v. Semple, 111 Ala. 637.

[9] Gentry v. Lawley, 142 Ala. 333.

[10] 76 Ala. 509.

[11] 54 Ala. 50.

[12] 70 Ala. 567.

[13] 76 Ala. 509.

ises "upon the condition of paying to the purchaser the amount justly due him;" so the ordering of a reference for an account to ascertain such amount, was held not to affect the finality of the decree granting relief. On the other hand in Kimbrell v. Rogers[14] where again the bill was to foreclose a lien, the ascertainment of its existence was dependent upon the report of the reference; and the decree that the plaintiff "was entitled to relief" could not affect it. "Whether there was anything due on the mortgage was a disputed question in the case. The indebtedness claimed was denied by the answer of Kimbrell."

The effect of these decisions is that the character of a decree of reference depends upon whether the result of the reference can change the right to relief, and that without regard to the wording of the decree.

§ 570. Decrees of reference: when final, (continued).—The later decisions, however, have modified that conclusion, and now for a decree involving a reference to be a final decree it must be a clear adjudication of the fact that the plaintiff is entitled to recover, and must recite it distinctly. This conclusion has been a growth, of course.

In Garry v. Jenkins,[15] the suit was a creditors' bill on behalf of the plaintiff and other creditors who might come in, and sought to charge a purchaser of property from the debtor as trustee in invitum. The answer admitted the plaintiff's debt, and the decree recited this admission, adjudged the plaintiff's equity, and ordered a reference to determine the respective amounts of the various claims. The Supreme Court reviewed the cases and held the decree a final decree.

In Savage v. Johnson[16] the effect of the facts seems to have been the same as in Garry v. Jenkins, in that the defendants were declared trustees and due to account to the plaintiff for the funds in their hands; but the plaintiff's debt was not expressly admitted, although the decree declared "that the complainant is entitled to the relief prayed for in his bill of complaint." The Supreme Court divided in opinion, but the ma-

[14] 90 Ala. 339.
[15] 109 Ala. 471.
[16] 125 Ala. 673.

jority held on a rehearing that the decree was not final because it did not clearly decree an indebtedness by the insolvent debtor to the plaintiff without regard to the result of the reference.

While the soundness of this test has not been lately discussed, it has been the basis of subsequent decisions.[17]

§ 571. When decree of reference should not affirm equities.—Of course there are many cases in which it is impossible to tell until the reference has been had whether the plaintiff has a balance in his favor to be enforced by a sale or money decree, or whether his suit will be dismissed; and when there is any possibility that the result of the reference will alter the equities, the Supreme Court has indicated that it is "the better practice to render an interlocutory decree merely expressive of the opinion formed as to the rights of the parties."[18] But the draughtsman must be careful to avoid uncertainties when he intends a final decree; for the court in summarizing the law has said "As to the form of the decree, in order to make a final decree, it is not sufficient to state that 'it seems to the court that the plaintiff is entitled to relief,' or to express the 'opinion' that he is, or that 'it appears to the court,' etc., it must be a clear judicial determination of the fact."[19]

§ 572. There may be two final decrees.—The result of holding that a decree of reference may be a final decree, of course is that the decree of the chancellor acting upon the report of the reference and exceptions thereto becomes of necessity another final decree. And the court has so held; but in order to avoid the apparent paradox of referring to the decree of reference as a final decree when the cause is not over, the decree of reference has been said to be partly interlocutory and partly final. "If it settle all the equities between the parties, it is, to that extent, final. If it is necessary to take an account, or other proceedings must be had to carry it into effect, to this last extent it is interlocutory, and may be moulded, modi-

[17] Beall v. Lehman Durr-Co., 128 Ala. 165; Tatum v. Yahn, 130 Ala. 575; Gentry v. Lawley, 142 Ala. 333.

[18] Per Simpson, J., in Gentry v. Lawley, 142 Ala. 333, citing Jones v. Wilson, 54 Ala. 50.

[19] Ibid. And see Ex parte Gist, 119 Ala. 463.

fied or altered by the chancellor as any other interlocutory decree may be. The principles of relief cannot be altered, for they are final; directions for carrying the decree into effect may be modified, for they are interlocutory."[20]

§ 573. There may be many final decrees.—But this holding has left open the flood gates, and has made it necessary to hold in long cases like the administration of estates that every proceding conclusive at the time it is had is the basis for a final decree, even though many subsequent proceedings of all sorts be necessary before the cause will be over. Thus, a decree directing the removal of the administration of an estate into chancery, and directing a reference to ascertain the amount of money in the hands of an executor, and what debts remain unpaid, "and whether or not there is any reason why a final settlement of said estate should not be forthwith had," is a final decree and may be appealed from as such.[21] And a decree upon a petition by the administrator in such a cause, seeking as a part of the administration to sell the lands of the intestate for division among the heirs, is a final decree subject to review by the Supreme Court.[22] It is true that the court have not expressly called this last decree a final decree. But the appeal was entertained; and since as we have seen, the right to appeal from an interlocutory decree is a jurisdictional fact not to be acquired by consent,[23] and this decree is not named among the interlocutory decrees from which appeals may be taken, the allowance of the appeal recognizes the decree as final.

§ 574. Not all the equities need be determined.—It is apparent from such cases that the test by which a decree is supposed to be final or not according as it does or does not settle all the equities involved in the cause, is subject to some necessary exceptions. That this test must be entirely abandoned, however, and that the finality of a decree depends merely "upon whether it concludes a party in imposing on him a

[20] Per Stone, J., in Cochran v. Miller, 74 Ala. 50, 63. And see Adams v. Sayre, 76 Ala. 509.

[21] Alexander v. Bates, 127 Ala. 328.

[22] Roy v. Roy, 48 So. Rep. 793. (Feb. 1909.)

[23] See § 481, ante.

liability or in depriving him of a right," as was said in Alexander v. Bates,[24] is probably going too far the other way. It seems better to say that, "No general rule can probably be stated, which would define accurately, for all possible emergencies, what constitutes the equities of every case. Those equities embrace the substantial merits of the controversy—the material issues of fact and law litigated or necessarily involved in the cause, which determine the legal rights of the parties, and the principles by which such rights are to be worked out."[25] And even that generalization should be modified by adding that the equities of the case which must be adjuged in order to a final decree are only those involved at the particular stage of the cause at which the decree is rendered. This will cover the administration cases; and it may cover, too, decrees on demurrers; for we have seen that a decree upon a demurrer may be a final decree.[26] But probably after all no perfect test is possible, and the question what is a final decree is a matter of common sense.

§ 575. Matter of final decrees.—Assuming that a given decree is undoubtedly a final decree in a cause, it is almost a part of equity jurisdiction to consider its matter. But the new section 3212 of the Code of 1907 affecting the matter of final decrees has been repeatedly discussed in earlier chapters of this work, and therefore it is appropriate that brief reference should be made to it here under the discussion of final decrees.

Section 3212 provides that "on the submission of any cause for final decree the chancellor may render decree granting such relief as the equity and justice of the case may require in favor of any one or more complainants, and denying relief to any one or more complainants and against any one or more defendants as they may be entitled under the facts."

This dispenses with the old rule which had become established in chancery that all the plaintiffs must be able to recover or none could do so, and has been fully considered

[24] Per Sharpe, J., in Alexander v. Bates, 127 Ala. 328, 342.

[25] Per Sommerville, J., in Adams v. Sayre, 76 Ala. 509.

[26] See §§ 421, 422, ante.

under the subject of parties to the suit.[27] It is not probable that the intent of the section goes further and abolishes multifariousness in a bill;[28] nor that it changes the rule of substantive law that a discharge effective against one joint obligee to a chose in action, is effective against all.[29]

§ 576. Money decrees not liens.—When decrees of the court of chancery are for the payment of money, they are not liens under Alabama law. But the Code of 1907 provides that executions issued upon such decrees "are liens upon real and personal property subject to execution, from their delivery or filing for record in the same manner and to the same extent * * * as in courts of law."[30]

§ 577. Decrees for conveyances operate as such.—"When a decree is made for a conveyance, release, or acquittance," however, "and the party against whom the decree is made does not execute the same by the time specified in the decree, such decree operates in all respects as fully as if the conveyance, release, or acquittance, was made; or the court may decree in default of" such execution by the defendant ordered to make it, that the conveyance, release, or acquaintance "be executed by the register or a commissioner in the name of the party," and this execution shall be as valid as if made by the party himself.[31]

The court is also authorized by law to "directly divest title out of one party and vest it in another;"[32] but the provision in the Code authorizing this process appeared first in the Code of 1896. Prior thereto the decisions upon this power of the court of chancery were in conflict.[33]

[27] See § 154, et seq., § 174, et seq., ante.

[28] See § 177, ante.

[29] See § 178, ante.

[30] Sec. 3210, Code of 1907.

[31] Sec. 3211, Code of 1907.

[32] Ibid.

[33] Brewer v. Brewer, 19 Ala. 481, recognizing the power, was overruled by Ashford v. Prewitt, 90 Ala. 294; and that case was in turn overruled by Jones v. Woodstock Iron Co., 95 Ala. 551.

It was held however that the holding of the court in each case became substantive law and that no titles in this state based upon such holding were affected by the change of opinion in the Supreme Court. Ashford v. Prewitt, 102 Ala. 264; Jones v. Woodstock Iron Co., 95 Ala. 551; Farrier v. New England Mtge. Sec. Co., 92 Ala. 176.

§ 578. How and by whom decrees rendered.—Decrees and orders must always be rendered in writing;[34] and "with the exception of their captions, shall be entered at length upon the minutes of the court. The chancellor's reason, however, for such decree or order shall not be entered."[35]

But it is not essential to the legal effect of a decree that it be rendered by the chancellor or the court. "By agreement in writing filed with the register in vacation, or by an entry on the minutes in term time, the parties may refer a cause to an arbitrator of their selection, for a final decree. The arbitrator must certify the decree when rendered, to the register, and the register must enter it on the minutes of the court," when it has the effect of a decree by the court.[36]

§ 579. When decrees rendered.—Decrees by the court are rendered in term time if practicable; but the chancellor is authorized, if he sees fit, to reserve the rendition of a decree until vacation, and he "may render it at any time before or during the next term."[37] By written consent of the parties or their counsel chancellors may make orders and render final decrees at any time.[38] But if the parties desire the decree to be rendered in vacation upon a submission in vacation, the written consent must not be omitted or the decree will be void.[39] The agreement must be signed by the parties or their counsel, and be filed in the cause; and if any party is an infant, the guardian or guardian ad litem or the next friend or the solicitor acting for him, must sign for the infant.[40]

It is further provided by Chancery Rule 78 that "when a cause is submitted during term time for a decree or order, such decree shall be valid if rendered during any vacation." And this has been construed to involve a consent that the decree be rendered in accordance with the rule, and is held therefore not to conflict with the section of the Code fixing a set time within which the decree must be rendered.[41] But

[34] Sec. 3207, Code of 1907.

[35] Chancery Rule 80, Code of 1907.

[36] Sec. 3208, Code of 1907.

[37] Sec. 3207, Code of 1907; Hooper v. Strahan, 71 Ala. 75.

[38] Sec. 3209, Code of 1907.

[39] Adams v. Wright, 129 Ala. 305; Foster v. Foster, 126 Ala. 257.

[40] Chancery Rule 79, Code of 1907.

[41] Shine v. Bolling, 82 Ala. 415.

if the vacation is not until after the next term, the validity of this rule to uphold the decree may well be doubted.

§ 580. Decrees in vacation.—When a decree is rendered in vacation the register is required, as soon as he receives it, to enter it at length upon the minute book of the court immediately after the minutes of the previous term, and to date the entry; and the decree is considered enrolled from that time.[42]

And if the decree rendered in vacation is for anything but the payment of money, process cannot issue upon it until the next term, except upon special notice; because "either party may apply for a rehearing by the second day of the next ensuing term" of the court.[43] This right to apply for a rehearing is applicable to every decree rendered in vacation.[44]

§ 581. Questioning final decree after adjournment.—Finally, Chancery Rule 83 provides that "a final decree shall not be called in question before the court rendering it after the adjournment of the term when rendered, except by bill of review, and shall never be impeached by original bill, unless on the ground of fraud."

After adjournment the only remedy against error in a final decree is by appeal to the Supreme Court.

[42] Chancery Rule 78, Code of 1907.

[43] Chancery Rule 78, Code of 1907.

[44] Ga. Pac. Ry. Co., v. Gaines, 88 Ala. 377.

CHAPTER XXVI.

APPEALS.

§ 582. Who may appeal: severance.—Chancery Rule 85 provides that "any complainant or defendant in a cause in which a decree or order final may have been rendered, may appeal to the Supreme Court in the name of himself and all other complainants or defendants to the decree."

But on such an appeal the decree will not be reversed except for errors prejudicial to all the parties in whose name the appeal was taken. If a joint plaintiff or defendant desires to correct errors prejudicial to himself and not to his co-plaintiff or co-defendant, as the case may be, he must appeal in the name of all the parties on that side, and then obtain at the hearing of his appeal in the supreme court an order of severance, which allows him to assign for review the points in the decree believed to be prejudicial to him alone.[1]

But where errors are assigned by one of several joint parties without obtaining a severance the omission may be cured by amendment; and if the cause is submitted without objection by the appellee, the settled practice is for the Supreme Court "not to dismiss the appeal ex mero motu because of such amendable irregularity or defect, but to proceed to render judgment as if no such defect existed."[2]

§ 583. What reviewed on appeal from final decree.—The Code provides an appeal to the Supreme Court from any final judgment or decree of a chancery court or court of like jurisdiction.[3] But this does not limit the review to the final decree itself. The correctness of all interlocutory decrees in the cause upon which a special appeal is not allowed is also subject to review;[4] and even those interlocutory decrees upon

[1] Beachman v. Aurora Silver Plate Mfg. Co., 110 Ala. 555; Prestridge v. Wallace, 46 So. Rep. 970.

[2] Vaughan v. Higgins, 68 Ala. 546; Louisville Mfg. Co. v. Brown, 101 Ala. 273.

[3] Sec. 2837, Code of 1907.

[4] Northwestern Land Assn. v. Grady, 137 Ala. 219; Buford v. Ward, 108 Ala. 307. Of course the decisions to this effect are innumerable, but the above show the existence of the right of ap-

which an appeal might have been taken but was not taken, are subject to review on the final appeal; for the sections of the Code authorizing the taking of immediate appeals from certain interlocutory decrees expressly forbid that the failure to do so be taken as a waiver of errors involved in them.[5]

§ 584. Consent cannot give the Supreme Court jurisdiction. —But if the appeal is made to the Supreme Court as from a final decree, the decree must be actually a final decree. Consent of the parties cannot give the court jurisdiction as of a final decree when the decree is not final, any more than it can give it jurisdiction of an appeal from an interlocutory decree when the appeal is not authorized by the statute.[6] In Trump v. McDonnell,[7] the court said: "It is settled by an unbroken line of decisions in this court in harmony with the rule existing generally, that the existence in the record of a final or an appealable interlocutory decree is a jurisdictional fact, without which an appeal cannot be entertained even by consent of parties. We therefore feel bound to take notice, upon our own motion of the character of the decree of the chancery court, although counsel on both sides have argued the case as if the appeal were prosecuted from a final decree."

The details of the procedure in getting into the Supreme Court may be waived, however, as we shall see, by joining in error without objection.

§ 585. Review of law and facts.—In summing up the jurisdiction of the Supreme Court, the Code provides that "in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the Supreme Court shall weigh the evidence, and give judgment as they deem just."[8] This provision appeared first in the Code of 1886. Prior thereto the finding of the facts by the chancellor, 'upon testimony reduced to writing, was presumed to be correct, and would not be reversed in the Su-

peal on such interlocutory decrees. The last case is Harper v. Raisin Fert. Co., 48 So. Rep. 589.

[5] Secs. 2838, 2845, Code of 1907. And see, Nelms v. McGraw, 93 Ala. 245; Wadsworth v. Goree, 96 Ala. 227. For the interlocutory decrees upon which immediate appeal is allowed, see Chapter XVIII, ante.

[6] See § 481, ante.

[7] 112 Ala. 256.

[8] Sec. 5955, sub. § (1), Code of 1907.

preme Court unless there was a decided preponderance of evidence against the conclusion he attained."[9] But now the Supreme Court say that 'no presumption in favor of the chancellor's findings as to the facts can be indulged."[10]

It has been suggested that the provision is unconstitutional in that it bestows original jurisdiction upon the Supreme Court contrary to section 140 of the constitution; but this is probably unsound.[11]

§ 586. Time of taking appeals from final decrees.—The time within which appeals to the Supreme Court must be taken from final decrees of chancery courts or courts exercising chancery jurisdiction, is fixed by the Code of 1907 at six months, except in cases especially provided for, instead of twelve months, as was the law formerly.[12] And when errors are assigned after the statutory period upon a decree which was final, they will be stricken out upon motion by the opposite party.[13] Apparently a motion is necessary, however, to have an appeal dismissed because taken too late.

The final decrees from which a different time for taking appeals is provided, are decrees of divorce, from which appeal must be taken "within sixty days from the date upon which such decree of divorce was rendered;"[14] and probably decrees "on a partial or annual settlement of an estate of a deceased person" when made in connection with the final decree removing the administration of the estate into chancery;[15] since the Code provides that "from any decree rendered by a court of equity * * * on a partial or annual settlement of an estate of a deceased person, an appeal lies to the Supreme Court" within twelve months.[16]

[9] Nooe's Execr. v. Garner's Admr., 70 Ala. 443; Wilkinson v. Searcy, 74 Ala. 243; Moog v. Farley, 79 Ala. 246.

[10] The H. B. Claflin Co. v. Muskogee Mfg. Co., 127 Ala. 376; Shows v. Folmar, 133 Ala. 599; Emfinger v. Emfinger, 137 Ala. 337. Pollard v. Am. Freehold Land Mtge. Co., 139 Ala. 183, 213; Williams v. Norton, 139 Ala. 402.

[11] The State v. Flinn, Minor, 8.

[12] Sec. 2868, Code of 1907.

[13] Foley v. Leva, 101 Ala. 395; Kimbrell v. Rogers, 90 Ala. 339; Stoudenmire v. DeBardeleben, 85 Ala. 85.

[14] Sec. 2869, Code of 1907.

[15] Alexander v. Bates, 127 Ala. 328.

[16] Sec. 2845, Code of 1907.

The period of limitation is estimated from the date of rendition of the decree, to the date "when the party desiring to prosecute the appeal has complied with the conditions upon which the law gives the right," although the citation of appeal and summons may not be issued and executed until afterwards;[17] and in counting the time the first day is omitted, and the last day counted as a part of the period.[18]

§ 587. Method of taking appeals: costs.—Aside from the oral application to the register to approve the security or names of sureties offered with the bond to be executed by the appellant obligating him to pay the costs of appeal in case they become chargeable to him, there are no formalities to be pursued in taking an appeal. "An appeal is 'taken,' within the meaning of our statute when the party desiring to prosecute it has complied with the conditions upon which the law gives the right." And when the appellant has filed with the register within the time allowed for taking the appeal, a sufficient undertaking to secure costs, 'whatever else remains to be done in effectuating a review of the case by the Supreme Court depends upon the discharge of duty by a public officer and not upon any act of the appellants.'[19]

The appeal alone does not suspend the execution of the decree by the lower court, however.[20] To accomplish the holding in abeyance of the decree pending the determination of the appeal, another bond must be given in a sum double the amount of a money decree, and in a sum to be fixed by the register in other cases.[21]

§ 588. The record.—It is not proposed in this book to discuss the practice in the Supreme Court of Alabama; as that is not peculiar to chancery cases. And it is not necessary to recite all the statutory steps incident to the preparation by the register of the record in the cause and the proper transference of it to the Supreme Court. All the requirements to that end, together with the rules of procedure after taking the appeal, may be learned by referring to Chapter 53, sec-

[17] Kimbrell v. Rogers, 90 Ala. 339.

[18] Lanier v. Russell, 74 Ala. 364.

[19] Kimbrell v. Rogers, 90 Ala. 339. 343.

[20] Ex parte Hood, 107 Ala. 520.

[21] Secs. 2873-2875, Code of 1907.

tions 2837 to 2895 of the Code of 1907 upon the subject of Appeals, Chapter 141, sections 5948 to 5967, upon the Supreme Court, and the Rules of Practice in the Supreme Court, published on pages 1505 to 1517 of Volume II of the Code of 1907.

Suffice it to say that "The register * * * must, on the application of the appellant or his attorney, make and deliver to him in time to be returned to the Supreme Court, a full and complete transcript of the record and proceedings in the case, together with his certificate that the appeal was taken, and the time when, and when returnable, and the citation and a copy of the appeal bond, if any was given, with his certificate that it is a complete transcript of all the proceedings in the cause." The register "must envelope and seal up the whole in a package directed to the Clerk of the Supreme Court, or deliver to the attorney applying" for it.[22]

§ 589. Assignment of errors.—Upon this record the appellant is required to write out concisely the errors which he believes to exist in the decree from which he appeals; and the appellee should join issue with the appellant by writing the words "There is no error in the record" below the assignments of the appellant,[23] unless indeed there is a cross appeal by the appellee, in which case of course he should properly save his own assignments. The practice is allowed, however, for the appellee not to make any written joinder in error, his joining in the submission amounting to a denial of error in the record.

Errors other than those arising from the want of jurisdiction will not be considered by the Supreme Court unless assigned upon the record.[24] And even of those assigned all not urged by the appellant in his brief or argument will be deemed abandoned;[25] for no case shall be submitted to the Supreme Court by an appellant, without his brief accompanying it.[26]

[22] Sec. 2848, Code of 1907.

[23] Supreme Court Rule 1, Code of 1907.

[24] Lehman v. Meyer, 67 Ala. 396.

[25] Williams v. Spragins, 102 Ala. 424, 431; So. Ry. Co. v. Cunningham, 112 Ala. 496.

[26] Supreme Court Rule 13, Code of 1907.

§ 590. Effect of joinder in error.—For the appellee to join in error by denying in writing that there is error upon the record, or for him even to appear and without objection join in the submission of the appeal to the Supreme Court, amounts to a waiver of all irregularities in the method of taking appeal; and this waiver cannot be withdrawn without the appellant's consent.[27] It will also heal defects of the certified record sent up for review.[28]

§ 591. Cross appeals.—When the appellee takes a cross-appeal, he may pursue the same step as the appellant in taking the appeal. But a Supreme Court Rule provides that there shall be but one transcript; so the custom is for the appellee's solicitor to obtain the consent of the appellant's solicitor to assign cross-errors upon the transcript made upon the appellant's appeal, and this has the same effect.[29] Cross-assignments will not be considered, however, unless the appellant's written consent appears upon the record, or his written joinder in the cross-assignments, which amounts to his implied consent.[30]

§ 592. Effect of appeals.—Finally as to the effect of an appeal. While, as we have just seen, the appeal in the absence of a supersideas bond will not hold up the execution of the decree appealed from, yet so far as the equities of the case are involved, the appeal removes the cause wholly and absolutely into the Supreme Court, and the chancellor can make no order or decree affecting the rights or the equities of the parties so far as they are involved in the decree appealed from until the appeal has been dismissed or decided.[31] And "the Supreme Court may upon the reversal or any judgment or decree, remand the same for further proceedings, or render such judgment or decree as the court below should have rendered, when the record enables it to do so."[32]

[27] Thompson v. Lea, 28 Ala. 453; Robinson v. Murphy, 69 Ala. 543.

[28] Mobile Mutual Ins. Co., v. Cleveland, 76 Ala. 321.

[29] Supreme Court Rule 3, Code of 1907.

[30] Golden v. Golden, 102 Ala. 353; Jones v. Peebles, 133 Ala. 290, 304.

[31] Ex parte Hood, 107 Ala. 520; Allen v. Allen, 80 Ala. 154.

[32] Sec. 2890, Code of 1907.

CHAPTER XXVII.

References and Reports.

§ 593. The register as master.—The Code in reciting the duties of the register in chancery, provides that it is his duty "to perform the duties of master, unless otherwise ordered by the chancellor."[1] And while at least one instance of another master than the register holding a reference appears in the Alabama Reports,[2] it is so nearly universally the custom for the register to occupy the position of master that no one else is ever thought of in connection with it. Hence causes in Alabama are never even referred in terms to masters to hold references, but are referred to the register as register, and the duties of master are impliedly conferred.

§ 594. The scope of references under English practice.—Neither statutory provision nor chancery rule defines the legitimate scope of references in Alabama. Nor do the decisions outline it. So we have to fall back primarily upon the English chancery practice for the basis of the master's powers. But even that is given to us by enumeration rather than upon principle. Daniell says: "References to the master upon decrees or decretal orders, are either; (1) To make inquiries; (2) To take accounts and make computations; or (3) To perform some special ministerial acts directed by the court.

"Inquiries by the master are directed either to persons or to facts, though sometimes they are directed to matters of law; but it is, in general, in those cases only where the law comes in as a matter of fact, as in the case of an inquiry into the law of a foreign country, that the master is ever directed to inquire into the law, the habit of the court not being to refer questions of law to the opinion of the masters. Sometimes, however, questions of law are so mixed up with the fact to be ascertained, that it is not possible to decide upon the one without giving an opinion as to the others. In such case

[1] Sec. 3074, sub. § (1), Code of 1907.

[2] Pearson v. Darrington, 32 Ala. 227.

the master is bound to give his opinion upon the law, as well as upon the matter of fact referred to him; as in the case of a reference to a master to inquire whether a good title can be made to land, &c.

"The most usual cases in which inquiries as to persons are directed to be made by a master, are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person. The same sort of inquiry is also frequently directed for the purpose of ascertaining the individuals forming a particular class, such as grandchildren, or cousins of a person deceased, or the persons entitled to a share of prize-money. A similar inquiry is also necessary where it is referred to the master to take an account of the debts due by a particular individual, such account involving, necessarily, an inquiry who the creditors are, as well as into the amount of their claims."[3]

§ 595. The scope of references in Alabama.—The admitted scope of references in Alabama is at least as broad as that pointed out by Daniell for English practice. A reference has been used to find out the heirs and next of kin of deceased persons.[4] In an involved case a reference was directed to ascertain and report what money was due a minor for his education, maintenance, and support during the past and the future; what part of it should be paid out of rents of a particular piece of land; what part of the particular piece of land was in the possession or control of a particular defendant; and what part was sold by particular persons to the defendant; and the annual income of each part.[5]

Where accounts and transactions of a partnership cover a period of many years, and the correctness of some items are impugned, it is proper to order a reference to state the account between the parties.[6]

"A chancery court has inherent power to have accounts involved in a suit before it stated and passed on by the register in the first instance, in order that his findings and report may

[3] 2 Daniell Ch. Pr. 1399.

[4] Roy v. Roy, No. 3759 in the Chancery Court for Jefferson County.

[5] Woodruff v. Smith, 127 Ala. 65.

[6] Speakman v. Vest, 45 So. Rep. 667.

facilitate the ascertainment of facts which are to govern its decree; and to proceed in that way is the usual and most convenient practice. The parties have no right to impose on the court the labor of obtaining data from depositions or other evidence for an original statement of accounts."[7]

And as an extreme example of the scope of a reference, a suit for alimony and counsel fees seems to have been almost entirely referred to the register to take the testimony and ascertain the facts upon which to base a decree.[8]

§ 596. Reference may be made of all but chief equities.— It is evident, therefore, that the only limitation upon the power of the court to make a reference, is that it cannot rid itself of the burden of determining the principal equities involved. Those must be decided directly by the court upon the testimony submitted by the parties. But if the plaintiff is found to be entitled to an accounting, or to a foreclosure of a mortgage, or to the application of certain property to the debts of himself and other creditors, then the cause may be referred to the register to determine the greater part of what remains to be settled.[9] And provided the equities are determined by the court, it is immaterial whether the reference to take the account or to ascertain other matters is made before or after their determination.[10] The reference should not be made, however, before issue is complete by answers or decrees pro confesso against all the defendants.[11]

§ 597. Register's power on reference limited by decree.— The scope of the reference is defined by the decree directing the holding of it. The fact that a reference could have been directed upon more points in the suit than were embraced in the decree, does not confer upon the register the power to go into those matters.[12] And conversely if the register

[7] Per Sharpe, J., in Smith v. Smith, 132 Ala. 138.

[8] Brady v. Brady, 144 Ala. 414.

[9] Speakman v. Vest, 45 So. Rep. 667; Richardson v. Horton, 139 Ala. 350; Louisville Mfg. Co. v. Brown, 101 Ala. 273, 279.

[10] Branch Bank of Mobile v. Strother, 15 Ala. 51; Smith v. Smith, 132 Ala. 138.

[11] Louisville Manufacturing Co. v. Brown, 101 Ala. 273.

[12] Henderson v. Huey, 45 Ala. 275, 282; Lang v. Brown, 21 Ala. 179.

'disregards the instructions and directions of the chancellor, and makes a report which does not furnish the facts necessary to enable the court to proceed to a final decree on the merits of the cause, it does not require exceptions to set the report aside. The chancellor should set it aside of his own motion.'[13]

§ 598. References are for the convenience of the court.—"The object of a reference to the register is to aid the chancellor."[14] It is not a right of the parties to have facts connected with collateral issues, or even the accuracy of accounts determined at those proceedings if the chancellor prefers to determine them himself; and where facts are admitted and nothing remains to be done but to make calculations of interests and deductions of credits, it is recommended by the Supreme Court that the chancellor do it himself and avoid the cost incident to a reference.[15]

§ 599. References instead of trials at law.—Important support of the proposition that the parties have no right to a reference, but that the ordering of it lies within the discretion of the chancellor, will be found in the Alabama cases upon the enjoining of nuisances, and upon the ascertainment of damages in connection with the settlement of equities. And incidentally it may be noted that the ordering of references in such cases, that is to say, in cases where issues at law were ordered in English practice, is a distinct enlargement of the scope of references beyond the subject matters for which they were directed in England. We have seen that one of the four fundamental distinctions between chancery procedure in Alabama and chancery procedure in England is the settling of all questions connected with an equity in the chancery court instead of directing preliminary or consequent trials at law, as for instance, to ascertain the fact of nuisance before granting a permanent injunction, and to ascertain the amount of damages past and future attendant upon a nuisance which the court undertakes to enjoin or abate.[16]

[13] Lang v. Brown, 21 Ala. 179, 190.

[14] Mahone v. Williams, 39 Ala. 202, 225.

[15] Thornton v. Neal, 49 Ala. 590; Chambers v. Wright, 52 Ala. 444.

[16] See § 20 et seq. ante.

§ 600. References instead of trials at law (continued).—In both such cases, the Supreme Court of Alabama formerly followed the English practice, leaving the fact of nuisance when in doubt,[17] and the quantum of damages[18] to be determined by a jury in a trial at law. And possibly even now under the Code the chancellor could, if he thought best, leave such matters to a jury trial either in the law courts or under his own supervision.[19] But in a recent case our Supreme Court held that the chancery court could determine the right of a plaintiff to an injunction, even when the facts were contested and in great doubt.[20] And when the injunction is being granted, it has been the chancellor's duty for some time to ascertain the damages in the one proceeding.[21]

But it would seem that in both instances the chancellor could ascertain the facts through a reference to the register, if that were the most convenient method. Upon the issue of a nuisance the Supreme Court has not yet spoken; but upon the determination of the question of damages, they have said that it "could have been done either by the chancellor himself, or by reference to the register for report, or else it could have been submitted to the determination of a jury" under the chancellor's direction.[22]

§ 601. Procedure on references.—The sessions held by the register on a reference shall be held at his office, unless the chancellor or the court otherwise directs, or he appoints some other place by consent of the parties.[23] The register must give reasonable notice of the time and place to all parties or their solicitors,[24] which in the absence of special direction by the court, shall be one day in term time, and five days in

[17] The State v. Mobile, 5 Porter 279; St. James' Church v. Arrington, 36 Ala. 546; Rouse v. Martin, 75 Ala. 510. In Ninninger v. Norwood, 72 Ala. 277, the facts were admitted.

[18] Stow v. Bozeman's Executors, 29 Ala. 397, 402.

[19] Sec. 3201, Code of 1907.

[20] Hundley v. Harrison, 123 Ala. 292.

[21] Farris v. Dudley, 78 Ala. 124; Whaley v. Wilson, 112 Ala. 627.

[22] Farris v. Dudley, 78 Ala. 124, 129; Whaley v. Wilson, 112 Ala. 627.

[23] Chancery Rule 87, Code of 1907.

[24] Sec. 3158, Code of 1907.

vacation.[25] But if any defendant has failed to answer the bill, or is in default for other cause, notice may be entered upon the order book of the register; and it may be that upon references for the taking of an account not even notice on the order book to such defendants is necessary.[26]

"If either party fail to appear at the time and place appointed, the register may proceed ex parte," or adjourn to another day as he sees fit, giving notice to the other party of the adjournment.[27] But the reference must be held within three months from the date of the decree ordering it, unless a greater or less time is specified.[28] And it is the duty of the party at whose instance the reference is ordered, to see to it that the matter is presented to the register within the required time; or on his failure to do so, the court may dismiss the suit.[29]

§ 602. The testimony and how taken down.—In arriving at his conclusions on a reference the register is authorized to use "all affidavits, depositions, and documents which have been made or filed in the cause,"[30] including the answers; provided of course the answer of one defendant is not taken as evidence against other defendants.[31] He is also authorized "to hear the depositions of witnesses taken under a commission, or upon oral examination," as at hearings before the court, and to require the production of all books, papers, writings, vouchers, and documents in relation to the matters under investigation.[32]

But he is also given the authority to examine witnesses under oath viva voce;[33] and as this is his usual method of hearing testimony, it is this feature of references which gives the register's reports their chief weight. Whatever oral testimony he hears, he is required to take down in writing,

[25] Chancery Rules 115, 91, Code of 1907.

[26] Sec. 3133, Code of 1907; Chancery Rule 91.

[27] Sec. 3158, Code of 1907.

[28] Sec. 3157, Code of 1907.

[29] Ibid. And see Smith v. Smith, 132 Ala. 138; McGrath v. Stein, 148 Ala. 370.

[30] Sec. 3160, Code of 1907.

[31] Halstead v. Shepard, 23 Ala. 558; Pearson v. Darrington, 32 Ala. 227.

[32] Sec. 3159, Code of 1907.

[33] Ibid.

however, and to page, to mark on the margin with the name of the witness and the subject, and to fasten together and make a part of the file in the cause.[34] And he must make a statement corresponding with the note of testimony at a hearing before the chancellor, reciting all the testimony of every kind given in before him, "in order that he may be able to furnish copies to the parties on their application," if they take exceptions to the report.[35]

Moreover it must be noted that the rule applicable to taking testimony in the main cause by which a party filing interrogatories to witnesses must furnish the names of the witnesses to be examined,[36] has no application to references; for witnesses may be for the first time presented by either party at the reference, and their testimony must be taken.[37]

§ 603. Objections and exceptions at the reference.—There is a difference between the objections and exceptions to actions of the register which must be taken at the time of the reference in order to have them reviewed by the chancellor, and the objections and exceptions to actions of the register on the reference which need only be taken to his report. Chancery Rule 88 provides that "exceptions to rulings of the register on testimony admitted or rejected by him, must be noted by him; and if not so taken, the exception is waived." So there is no doubt but that such rulings must be objected to at the reference. Moreover exceptions to the admissibility of evidence even when taken at the reference will not be sustained, either by the chancellor or the Supreme Court, if there was other legal evidence upon which the register's conclusion can be supported.[38] "The findings of the register upon testimony taken before him will not be set aside when like testimony would support a jury's verdict."[39]

§ 604. Clark v. Knox.—It is probable that exceptions to

[34] Chancery Rule 88, Code of 1907; Mahone v. Williams, 39 Ala. 202; Weaver v. Cooper, 73 Ala. 318.

[35] Mahone v. Williams, 39 Ala. 202, 224.

[36] Chancery Rule 60, Code of 1907.

[37] Brady v. Brady, 144 Ala. 414.

[38] Anniston Loan & Trust Co. v. Ward, 108 Ala. 85.

[39] Am. Pig Iron Storage Warrant Co. v. German, 126 Ala. 194, 242.

rulings upon testimony are not the only ones which must be taken at the reference. In Clark v. Knox[40] Chief Justice Brickell indicated in delivering the opinion of the court upon the case that all exceptions and objections to actions of the register must be founded upon objections allowed or overruled by him at the reference, citing the English practice. And while the majority of the court rendered another opinion through Justice Stone disapproving such a view, basing their conclusion upon a construction of Chancery Rules 92 and 93 as they appear in the Code of 1907, they used the following somewhat ambiguous language:—

"We will not say that there may not be cases, in which, to sustain an exception before the chancellor, the record must affirmatively show action taken or motion made by counsel before the register. A failure to take proof, or to act on a matter not specially referred to him in the decretal order, or instructions, would present such a case. It is not the duty of the register to procure or present proof; counsel must do that. A failure to institute an inquiry, or to hear testimony on a question not expressly or by necessary implication referred to him, would present no ground for an exception, unless the inquiry was pertinent and material, and the register was put in fault by refusing to hear such testimony when offered, or to consider such question when moved thereto. And a party seeking to except on such ground must have the record show he made the necessary motion in the premises. The court never presumes error, but requires it to be shown.

"When, however, the register's report or the testimony, one or both, show that he has disobeyed the mandate of the decretal order or chancellor's instructions, or that he has otherwise committed some positive error of law or of fact, it is not necessary that any motion or exception should be made or taken before him, or that he shall be notified an exception will be taken. A day is allowed, after the report is read in court, for the filing of exceptions to it; and it is not necessary that any one shall have earlier notice of the intention to except to it."

[40] 70 Ala. 607.

Chief Justice Brickell's view has never been taken since that decision, and the view of the majority has remained law, as we shall see, so far as the construction of Chancery Rules 92 and 93 is concerned. But while no instance seems to have arisen in the published reports of other objections than rulings upon evidence which require to be taken at the reference, section 3161 of the Code provides that either party may reserve in writing any question arising on a reference for the revision of the chancellor; and this seems not to be limited to rulings upon evidence.

§ 605. The register's report.—Unless the decree of reference requires the register to report the evidence submitted to him at the reference, it is his duty "simply to state the facts found by him, as is done in a special verdict," and it is irregular for him to report the evidence. The latter if oral he takes down in writing, as we have seen, and has in the file for production in case exceptions are taken to the report.[41] But if the reference involve the taking of an account, unless merely to ascertain the amount due from one party to another, the account "shall be in the form of debtor and creditor and the vouchers must be so numbered as to correspond with the numbers on the account;"[42] and the account itself, "not the results without the processes by which they were ascertained," must be a part of the report; and "if necessary to a proper understanding of the account," should be accompanied "by such explanations in the report of the register as that the chancellor, in case exceptions are taken to them, may be enabled readily to understand and pass on them."[43]

Moreover "in stating the account, the register should make annual rests, and proceed under section [4622] 2629 in making application of partial payments."[44]

§ 606. Exceptions to the report.—Now as to exceptions to the report, as distinguished from the exceptions to the rulings

[41] Mahone v. Williams, 39 Ala. 202, 222; Vaughan v. Smith, 69 Ala. 92.

[42] Chancery Rule 89, Code of 1907.

[43] O'Neill v. Perryman, 102 Ala. 522.

[44] McQueen v. Whetstone, 127 Ala. 417, 433.

which are taken at the reference. "No notice to the parties to bring in objections to the draft of a report shall be necessary, nor can any exceptions be taken before the register to such draft."[45] Exceptions to the report are taken in the chancery court.[46] And since exceptions are usually either to conclusions of the register as to facts, or conclusions of the register as to points of fact involving law, it is necessary in nearly every case to refer to the evidence taken before the register and on file. This is done by noting at the foot of each exception the evidence or parts of the evidence relied on to support the exception, by giving the name of the witness and designating the pages by appropriate marks to call the court's attention to it,[47] and the chancellor in considering the exception will refer to none of the evidence but that so noted.[48] But Rule 93 allows the opposing solicitor one day to note additional evidence. If the exception involves only legal conclusions of the register, however, this noting of evidence is of course unnecessary, although the item involved must be pointed out.[49]

"The function of an exception to a register's report is to point out distinctly and clearly the error, or the matter complained of as error."[50] The exception "is in the nature of a special demurrer, and the party objecting must put his finger on the error; otherwise, the part not excepted to may be taken as admitted," and therefore even when taken, exceptions must be insisted upon or they will be disregarded by the court.[51]

§ 607. Weight of the register's findings.—Since the register's report is usually based upon oral testimony, as well as upon the pleadings and depositions already filed in the cause, it is held that "the same weight and effect ought to be accorded to his findings which would be given to the verdict

[45] Chancery Rule 92, Code of 1907.

[46] Clark v. Knox, 70 Ala. 607, 625.

[47] Sec. 3161, Chancery Rule 93, Code of 1907.

[48] Chancery Rule 93; Mahone v. Williams, 39 Ala. 202, 223; Vaughan v. Smith, 69 Ala. 92; The State v. McBride, 76 Ala. 51, 60; Warren v. Lawson, 117 Ala. 339; Woodruff v. Smith, 127 Ala. 65.

[49] The State v. McBride, 76 Ala. 51.

[50] Per Tyson, J., in Campbell v. The H. B. Claflin Co., 135 Ala. 527.

[51] Ibid, quoting O'Reilly v. Brady, 28 Ala. 534.

of a jury. If from the whole evidence it is a matter of doubt whether the finding was correct, or if different impartial and intelligent persons might entertain different opinions as to the matter, the findings ought not, for such reason, to be disturbed."[52]

§ 608. Consideration by the chancellor, and appeals.—This rule applies to the review of the register's holding both by the chancellor and on appeal from his decision to the Supreme Court. But it does not apply to the chancellor's ruling if he reverses the register. Hence it is that the register's rulings upon the facts are more highly regarded than the chancellor's;[53] and this anomaly can be explained only upon the assumption that most of the conclusions of the register upon references are based upon oral testimony, while most of the conclusions of the chancellor are based upon depositions.

But when the exceptions are not taken properly, if the chancellor elects to rule upon them any way, in that event the Supreme Court will not review his conclusions.[54]

Chancery Rule 94 requires that the report lie over at least one day for exceptions, before being confirmed.

§ 609. References discretionary with chancellor.—Moreover the chancellor always has this control over the report of the reference, which relieves the situation of all danger. He can order a re-reference. And in this his power is absolutely discretionary; his decision will not be reviewed by the Supreme Court.[55]

§ 610. Sales by the register.—Before closing the discussion of references it is appropriate to take brief notice of that subject of references most commonly occurring, namely, sales directed by the court. The Code provides that "when any property is ordered to be sold by the decree of any chan-

[52] Per Haralson, J., in Chancellor v. Teel, 141 Ala. 634. And see Pollard v. Am. Freehold Land Mtge. Co., 139 Ala 183, 200; Jones v. White, 112 Ala. 449; Anniston Loan and Trust Co. v. Ward, 108 Ala. 85; Vaughan v. Smith, 69 Ala. 92.

[53] Pollard v. Am. Freehold Land Mtge. Co., 139 Ala. 183, 200; Sec. 5955 sub. § (1), Code of 1907.

[54] Woodruff v. Smith, 127 Ala. 65.

[55] Richardson v. Horton, 139 Ala. 350; Nunn v. Nunn, 66 Ala. 35.

cery court for the satisfaction of any debt secured by any mortgage or deed of trust, such sale shall in all cases be made by the register of the court ordering the same."[56] And the Code also provides for sales of property of joint owners for division when incapable of being divided between them.[57]

There is nothing peculiar about sales by order of the chancery court as compared with sales made by order of other courts, or sales under execution, except that in chancery a forthcoming bond is required of the defendant when the property is personalty, in order to guarantee delivery after the sale.[58] In law courts the property is usually in the possession of the sheriff.

In the chancery court the sale may be set aside for inadequacy of price if in the sound judgment of the chancellor justice so requires.[59] And the register's power of sale is absolutely limited by the decree directing him to sell.[60] Moreover, it is the confirmation of the sale by the chancellor which constitutes the sale proper, and not the actual offering and bidding.[61]

But the interesting question is, can a chancery court in Alabama direct and confirm a sale by private contract? If the sale is of property belonging to the estate of a deceased person, and is sold for division among the heirs on the application of the executor or administrator, a private sale is illegal.[62] In other cases the question is undecided.

[56] Sec. 3223, Code of 1907.

[57] Sec. 5231, Ibid.

[58] Sec. 3224, Ibid.

[59] Montague v. Internat. Trust Co., 142 Ala. 544.

[60] Stewart v. Wilson, 141 Ala. 405.

[61] Ex. parte Branch, 63 Ala. 383; Sayre v. Elyton Land Co., 73 Ala. 85; Roy v. Roy, 48 So. Rep. 793.

[62] Roy v. Roy, Ibid.

CHAPTER XXVIII.

Supplemental Bills and Original Bills in the Nature of Supplemental Bills.

§ 611. Subject somewhat confused.—Owing to the use of general if not doubtful language by way of dictum in a series of opinions denying intervention by petition in certain cases by persons setting forth liens entirely distinct from the subject matter involved in particular suits, the meaning of supplemental bills and bills in the nature of suplemental bills in Alabama practice has become confused.[1] The language is as follows:—"When a person not a party to a pending suit, between whom and the complainant there is no privity, but who has a claim or lien on the property,—a new and independent claim,—or is interested in the subject-matter of the suit, desires, for his own protection, to present his new claim, to assert his independent rights, and raise new issues, he must do so by a formal bill, containing appropriate allegations—an original bill in the nature of a cross bill, or of a supplemental bill, as the case may authorize."[2]

It is apparent that the language is purely general as to supplemental bills and original bills of that nature; for the decision in which it last appears allowed the bill presenting the lien as a purely original bill.[3] And that practice has since been pursued, even where the plaintiff called his bill a bill in the nature of a supplemental bill;[4] for it is a rule of our courts to act upon a bill in accordance with its essential nature, without regard to what it is called.[5] But while the court has corrected the idea that such a bill is a supplemental

[1] Ex parte Printup, 87 Ala. 148; Renfro v. Goetter, 78 Ala. 311; Cowles v. Andrews, 39 Ala. 125.

[2] The proper use of such petitions is defined in Louisville Mfg. Co. v. Brown, 101 Ala. 273. It appears last in the opinion in Talladega Mercantile Company v. Jenifer Iron Co., 102 Ala. 259, quoted verbatim from the earlier cases given in note (1).

[3] Ibid. Cf. Ex parte Gray, 47 So. So. 286.

[4] Scheerer v. Agee, 106 Ala. 139.

[5] Sayre v. Elyton Land Co., 73 Ala. 85.

bill, and in doing so has said it was an original bill, unfortunately the court has said also that it is "an original bill, having something of the nature of a supplemental bill, perhaps, in that it seeks in one phase to fasten a charge upon the subject matter there involved," etc.;[6] and therefore the nature of supplemental bills is still more uncertain, and it becomes necessary to go back to the fountain head in the early practice to identify them and to learn their use.

§ 612. Supplemental bills defined.—Daniell says:—"A supplemental bill may be necessary to remedy defects in a suit, either existing at the time when the original bill was filed, or which have since occurred in consequence of the birth of new parties or a change in the interests of those originally on the record."

"Nothing, however, which occurred prior to the filing of the original bill ought to be added by way of supplement, unless the state of the cause is such that an amendment can no longer be obtained."[7]

This description and purpose of supplemental bills is sustained by the early Alabama decisions;[8] except that they allowed the use of supplemental bills to insert matter to cure defects existing at the time of the filing of the original bill, even when the matter could have been inserted by amendment.[9]

§ 613. Supplemental bills of two kinds.—It is apparent, then, that supplemental bills are of two kinds; first, those which correct defects existing at the time of filing the bill, either by way of additional matter, or by way of additional parties; and secondly, those which set up matter or facts transpiring after the filing of the bill. And as the two kinds of supplemental bills have been differently affected by the statutes and Chancery Rules from time to time, their use must be traced separately.

[6] Scheerer v. Agee, 106 Ala. 139.

[7] 3 Daniell Ch. Pr. 1654.

[8] Bowie v. Minter, 2 Ala. 406; Cunningham v. Rogers, 14 Ala. 147; Potier v. Barclay, 15 Ala. 439; Ramey v. Green, 18 Ala. 771; Collins v. Lovenberg, 19 Ala. 682; Barringer v. Burke, 21 Ala. 765.

[9] Walker v. Hallett, 1 Ala. 378, 386.

§ 614. Effect of statutes upon first kind of supplemental bills.—While, as we have seen, the Supreme Court of Alabama early held that a supplemental bill could be used even when an amendment was possible, after the statutes providing amendments to bills gave the right of amendment its present breadth, the use of supplemental bills to bring in parties or to correct defects existing at the time of the filing of the bill fell entirely out of the practice; and no modern case involving it occurs in the reports. But it must not be overlooked that the right of amendment is over after a final decree;[10] and so that use of supplemental bills known to English practice, by which matter perfecting the bill and in aid of references and subsequent proceedings was sometimes brought into the cause, may be still availed of in Alabama and may appear in records before the Supreme Court at any day.[11]

§ 615. Effect of statutes upon second kind of supplemental bills.—The second kind of supplemental bills, those bringing in facts which have occurred subsequently to the filing of the original bill, occurred more frequently in the early Alabama Reports than the first kind; and was so common as to be regarded as the only kind of supplemental bill in use.[12] But beginning with the rules of chancery practice adopted by the Supreme Court at the January Term, 1854,[13] it has been a rule of practice that "new facts occurring since the filing of a bill may be introduced by way of amendment, without a supplemental bill."[14] And now the custom in Alabama is to resort to amendments for that purpose, and such an amendment is subject to the same limitations upon its scope which govern supplemental bills.[15]

[10] Sec. 3126, Code of 1907.

[11] 3 Daniell Ch. Pr. 1659, et seq. "A supplemental bill after a decree, however, must be strictly in aid of that which the court has already done." Ibid 1662.

[12] Bowie v. Minter, 2 Ala. 406, 411; Hill v. Hill, 10 Ala. 527; Ramey v. Green, 18 Ala. 771; Land v. Cowan, 19 Ala. 297; Barringer v. Burke, 21 Ala. 765.

[13] Published in the front of Vol. 24, Ala. Reports.

[14] Chancery Rule 45, Code of 1907.

[15] For the discussion of amendments bringing forward subsequent facts, see § 358, ante.

§ 616. General restrictions upon supplemental bills.—It has been repeatedly said that the supplemental bill is "a mere continuation of the original suit, and filed for the purpose of filling up such a deficiency as does not cause a material alteration in the matter in litigation, or a change of the principal parties; and when, therefore, it is only requisite to add something to the former proceedings in order to attain complete justice."[16] But the supplemental matter, whether made the basis of a supplemental bill, or brought into the suit by amendment, must not alone present the equities of the suit; the utmost it can do is to enlarge them.[17] A suit cannot be maintained upon a cause of action arising after the filing of the bill.[18]

§ 617. Original bills in the nature of supplemental bills.—An original bill in the nature of a supplemental bill seems never to have occurred in Alabama in a case determined by the Supreme Court.

But in addition to the uncertain reference to them above quoted[19] a definition or explanation of such a bill was attempted in an early case. The court said "an original bill in the nature of a supplemental bill is properly applicable when new parties, with new interests, arising from events since the institution of the suit, are brought before the court; the latter being to all intents and purposes, the commencement of a new suit, which nevertheless may in its consequences draw to itself the advantage of the proceedings in the former bill."[20]

This description is not very clear, so it is well to add a definition from the books: "If a sole plaintiff suing in his own right is deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, * * * ; or in case such a plaintiff assigns his whole interest

[16] Per Collier, C. J., in Bowie v. Minter, 2 Ala. 406, 411. And see Cunningham v. Rogers, 14 Ala. 147; Potier v. Barclay, 15 Ala. 439; Ramey v. Green, 18 Ala. 771.

[17] Hill v. Hill, 10 Ala. 527; Ramey v. Green, 18 Ala. 771; Land v. Cowan, 19 Ala. 297; Planters' and Merchants' Mut. Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Harper v. Raisin Co., 48 So. Rep. 589.

[18] Vaughan v. Vaughan, 30 Ala. 329.

[19] See § 611, supra.

[20] Per Collier, C .J., in Bowie v. Minter, 2 Ala. 406, 412.

to another, the plaintiff being no longer able to prosecute for want of interest, and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by means of a supplemental bill, but must be sought by an original bill in the nature of a supplemental bill."[21] But Daniell adds that there does not seem to be any general rule deducible from the authorities determining the cases in which the transmission of the interest of the sole plaintiff renders the one or the other forms of proceeding applicable.

§ 618. Form of supplemental bills, and special practice.— In filing supplemental bills, a Chancery Rule provides that it shall not be necessary to recite any part of the original bill nor of the subsequent proceedings, a reference to them in the supplemental bill being sufficient. It need set up only the new matter.[22]

Summons is necessary upon a supplemental bill; "and in general, the defendants to the original bill should be parties to it," although "it is filed by leave of the court." But "this permission is given as a matter of course, in a proper case, on an ex parte application."[23]

The summons must be returnable to a day certain not less than thirty days from issue, if the next term is that far off; and after it has been executed thirty days, if the supplemental matter has not been answered, a decree pro confesso may be taken, subject to be set aside on the filing of a full answer.

But no summons shall be returnable to a day beyond the first day of the next term, even though thirty days cannot intervene; and if as much as five days intervene, a decree pro confesso may be taken in default of an answer being filed by the commencement of the term.[24]

Publication may be had upon supplemental bills as upon original bills, even when the original bill has been duly answered.[25]

[21] Mitford (Lord Redesdale), quoted by Daniell. 3 Daniell Ch. Pr. 1666.

[22] Chancery Rule 102, Code of 1907, taken from the 49th Order of English Chancery of Aug., 1841.

[23] Per Ormond, J., in Walker v. Hallett, 1 Ala. 379.

[24] Chancery Rule 103, Code of 1907.

[25] Chancery Rule 104, Code of 1907.

CHAPTER XXIX.

Bills of Revivor.

§ 619. Definition and purpose.—A bill of revivor is a bill which may be filed "where a suit is perfect in its original formation, but afterwards becomes discontinued or imperfect by abatement;"[1] and in Alabama abatement commonly occurs either by the death of a party, or by the termination of the representative capacity of a party;[2] but it may occur also by the bankruptcy of a party,[3] and it occurs by statute when judgments and decrees remain unsatisfied for a certain number of years.[4]

In England a suit could be revived at any stage at which it abated, except that in general it could not be revived for the purpose of deciding the question of costs only.[5] And this is true in Alabama likewise, with the addition that in Alabama suits or decrees may be revived for costs; and whenever any suit in chancery is allowed to abate in consequence of the death of any one or more of the parties, the court will decree against the parties alive the costs accrued at their instance and direct the issue of summons to the legal representative of the deceased party to show cause why the costs accrued at the instance of the deceased party should not be paid by him.[6]

§ 620. By and against whom the bill may be filed.—A suit may be revived upon a bill of revivor in favor of or against the heirs, executor, or administrator of a deceased party, the question which it should be, the heirs or the executor, being

[1] 3 Daniell Ch. Pr. 1693.

[2] Duval's Heirs v. McLoskey, 1 Ala. 708, 725; Cullom v. Batre, 2 Ala. 415; Bowie v. Minter, 2 Ala. 406; Batre v. Auze, 5 Ala. 173.

[3] Brandon v. Cabiness, 10 Ala. 155; McDonald v. McMahon, 66 Ala. 115. In England the marriage of a female party might also be ground for a bill of revivor.

[4] Sec. 3147, et seq., Code of 1907; The State ex rel Waring v. Mayor &c., of Mobile, 24 Ala. 701; Deer v. State ex rel. Tuthill, 46 So. Rep. 848.

[5] 3 Daniell Ch. Pr. 1694.

[6] Ex parte Kirtland, 49 Ala. 403; Chancery Rule 105, Code of 1907.

determined by the rules determining the proper parties to a cause.[7] A suit begun during the minority of a party may be revived by him when of age; provided the suit was begun in the name of the infant by his guardian, and not in the name of the guardian alone.[8] And when suits of a public nature have been allowed to abate, as decrees to restrain or abate public nuisances, other citizens than those who instituted the suits may file bills or revivor to renew them.[9]

It was a rule of English practice, however, that a suit which abated before the rendition of the decree could be revived by the plaintiff's side only.[10] But this has been changed in Alabama by statute; and if the plaintiff does not revive the cause within ninety days, any defendant who has an interest in the prosecution of the suit may revive it at any time before the expiration of twelve months.[11]

§ 621. After decree any person interested may revive.—When a suit in chancery abates after the rendition of the decree, on the other hand, since the rights of the parties have been determined, any interested defendant always had the right to revive it without giving notice to the plaintiff;[12] and apparently he need not wait the ninety days in Alabama. But the right of revival after decree is not limited in Alabama to the parties. It is held that "the bill may be exhibited by one not a party, or deriving title under a party to the decree, if he has similar interests, and cannot without an execution of the decree, obtain a determination of his own rights."[13] But "the parties to the original decree must, as a general rule, be parties to the bill to revive and enforce it."[14]

§ 622. Original bills in the nature of bills of revivor.—Such a bill is hardly a simple bill of revivor; it is rather a bill in

[7] Bowie v. Minter, 2 Ala. 412; Frowner v. Johnson, 20 Ala. 477; Frowner v. Acre, 28 Ala. 580; Rhea v. Tucker, 56 Ala. 450.

[8] Bowie v. Minter, 2 Ala. 406.

[9] State ex rel. Waring v. Mayor &c., of Mobile, 24 Ala. 701; Deer v. State ex rel. Tuthill, 46 So. Rep. 848.

[10] 3 Daniell Ch. Pr. 1701.

[11] Sec. 3120, Code of 1907.

[12] 3 Daniell Ch. Pr. 1702.

[13] Per Brickell, C. J., in Griffin v. Spence, 69 Ala. 393, citing State ex rel. Waring v. Mayor &c., of Mobile, 24 Ala. 701.

[14] Ibid.

the nature of a bill of revivor. Daniell says:—"The distinction between bills of revivor and bills in the nature of bills of revivor, seems to be that the former, in case of death, are founded upon privity of blood or representation by operation of law; the latter in privity of estate, or title by the act of the party. In the former case, nothing can be in contest except whether the party be heir or personal representative; in the latter, the nature and operation of the whole act by which the privity of estate or title is created is open to controversy."[15]

§ 623. Bills of revivor and supplement.—Another bill of a slightly different nature from a simple bill of revivor is a bill of revivor and supplement; and this is appropriate where a revivor is necessary and allowable, and at the same time certain defects in the bill or the insertion of later facts and circumstances is desired.[16] But while occasions for such a bill would seem to be frequent, they do not seem to have been presented to our Supreme Court.

§ 624. Bills of revivor generally unnecessary in Alabama.—Such being the law of bills of revivor, it has been provided by a Chancery Rule in Alabama that "no bill of revivor shall be necessary to revive the suit unless so directed by the Chancellor" when a plaintiff dies and his personal representative or heirs seek to revive the suit, or when a defendant dies and it is desired to revive the suit against his personal representative or heirs, or when the plaintiff or the defendant is an executor or administrator and his representation terminates, and it is desired to revive against his successor.[17] On motion ex parte before the register in vacation or before the chancellor in term time the representative or heirs of the deceased plaintiff may become parties; and upon a verbal suggestion to the register or chancellor an ex parte order may be obtained for summons to issue to the personal representative or heirs or successor in representation of the deceased defendant; or upon proper affidavit publication may

[15] 3 Daniell Ch. Pr. 1718.

[16] Bowie v. Minter, 2 Ala. 406, 412.

[17] Chancery Rule 101, Code of 1907.

be had. Thirty days after service of summons to such a new defendant the suit will be considered as revived; and if no answer is filed a decree pro confesso may be taken, or a guardian ad litem may be appointed for a minor defendant, and the cause proceed as in other cases.

It will be noted, however, that this short method does not apply to all cases in which bills of revivor are necessary; and it is especially provided that it does not preclude the resort to the bill of revivor in any case if the applicant prefers to resort to a bill of revivor.[18]

§ 625. Revivor may be accomplished by amendment.—It has been held also that revivor of a suit may be accomplished by a plaintiff by an amendment of his bill, although this is an irregular method of accomplishing it;[19] and an amendment will suffice whether the new defendant be infant or adult.[20] But of course such a method is not to be recommended.

§ 626. Unless acting under Chancery Rule, leave to revive necessary.—While a bill of revivor does not make the suit a new one, but merely continues it,[21] leave to file a bill of revivor is necessary, usually with notice to the defendant as of other motions. But if the parties enter into an agreement treating the new party as a party, or if they allow the suit to be conducted without the proper notice, the irregularity is waived; and certainly cannot be raised first in the Supreme Court.[22]

§ 627. Limitation upon right of revivor.—As a rule the limitation upon the time within which revivor may be had is the statute of limitation upon the claim made the basis of the suit. But the proceeding is entirely one of chancery and is not governed by common law rules. "At the common law a suit when abated is dead. But in equity the same expression means merely a state of suspended animation, from

[18] Ibid. And see ex parte Kirtland, 49 Ala. 403.

[19] Floyd v. Ritter, 65 Ala. 501.

[20] Wells v. Am. Mort. Co., 109 Ala. 430.

[21] Duval v. McLoskey, 1 Ala. 708. Matters already decided cannot be litigated again after the suit is revived. Winston v. McAlpine, 65 Ala. 377.

[22] Batre v. Auze, 5 Ala. 173; Brandon v. Cabiness, 10 Ala. 155; Holman v. Bank of Norfolk, 12 Ala. 369.

which the suit may be revived." Therefore "equity has discretion to diminish somewhat the time if the ends of justice will thereby be observed."[23] And we have noted that a defendant's right to revive is limited to twelve months.[24]

§ 628. Special practice as to bills of revivor.—The same special practice provided by Chancery Rules for supplemental bills applies also to bills of revivor. It is not necessary to recite in the bill of revivor any part of the original bill, nor the subsequent proceedings; it is enough merely to refer to the cause to be revived and to make the appropriate prayer. Moreover summons must be returnable to a day certain not less than thirty days from the time of its issue, provided the next term is that far off; but it is returnable to the next term at all events, and if executed five days before its commencement proceedings may be had then upon the suit unless good cause be shown to the contrary.[25]

[23] Per Saffold, J., in ex parte Kirtland, 49 Ala. 403.

[24] Sec. 3120, Code of 1907.

[25] Chancery Rules 102, 103, Code of 1907. And compare § 618, ante.

CHAPTER XXX.

Bills of Review.

§ 629. Definition and purpose.—A bill of review is a bill filed in a cause after a final decree, and is directed to the reconsideration of the cause on account of error of law apparent in the record, or on account of new facts or subsequently discovered evidence.[1]

It can only be filed after a final decree, because before final decree in a cause all errors may still be corrected at the final hearing;[2] and of course new evidence could be brought in by supplemental bill, if the testimony has been published and motion to allow further testimony is refused.

But while it can be filed only after a final decree has been rendered, it may be filed either before or after the decree has been executed.

§ 630. Practice when decree has not been executed.—When a final decree has been rendered, and a bill of review is presented before the decree has been executed, "the chancellor may direct the proceedings on such decree to be suspended until a decree is rendered on such bill of review, or until the further order of the court, requiring such bond of the plaintiff as will effectually protect the interest of the parties interested in the decree rendered, on which bond the chancellor may render a final decree for any portion or the whole of the penalty."[3]

§ 631. Practice when final decree has been executed.—When the final decree sought to be reviewed has been executed before the filing of the bill of review, "and a simple reversal will not repair the injury resulting from it, a prayer for the further decree of the court to put the party complaining into the condition in which he would have been if the decree had not been executed is proper and usual. The restoration of

[1] 3 Daniell Ch. Pr. 1724, 1727; Planters' & Merchants' Bank v. Dundas, 10 Ala. 661.

[2] Savage v. Johnson, 127 Ala. 401.

[3] Sec. 3177, Code of 1907.

parties to the plight and condition in which they were at and prior to the rendition of an erroneous judgment or decree, and the restitution of all advantages the party obtaining it may have acquired by its enforcement, upon reversal, it is the spirit and policy of the law to promote and compel, when there are not facts or circumstances which may render restitution inequitable."[4]

§ 632. By whom filed.—A bill of review can be filed only by a party to the cause sought to be reviewed, or by some person holding under a party, or privy to him.[5] Nor will it be entertained at their instance to reverse and set aside a decree taken by consent,[6] "unless something which was not consented to has been inserted as by consent, or unless consent was procured by fraud."[7] But a simple bill of review cannot serve to attack a decree for having been obtained by fraud.[8]

§ 633. Original bills in the nature of bills of review.—When a party to a suit, or his privy, desires to review a decree as having been obtained by fraud, he should seek relief by an original bill in the nature of a bill of review; "and if the decree has been executed, may incorporate therein any matters necessary and proper to place the parties in the same situation in which they would have been, had the decree not been executed."[9] But a decree "is impeachable only for actual fraud in its procurement;" and "the bill must state the decree and proceedings which led to it, with the circumstances of fraud on which it is impeached."[10]

An original bill in the nature of a bill of review attacking a decree for fraud cannot be joined with a simple bill of review, making it a bill with a double aspect.[11] But although to that

[4] Per Brickell, C. J., in McCall v. McCurdy, 69 Ala. 65, 70. And see Mitchell v. Hardie, 84 Ala. 349.

[5] Curry v. Peebles, 83 Ala. 225; Allgood v. Bank of Piedmont, 130 Ala. 237.

[6] Adler v. Van Kirk, 114 Ala. 551.

[7] Per Clopton, J., in Curry v. Peebles, 83 Ala. 225.

[8] 3 Daniell Ch. Pr. 1724.

[9] Per Clopton, J., in Curry v. Peebles, 83 Ala. 225; Ex parte Smith, 34 Ala. 455.

[10] Per Brickell, C. J., in McDonald v. Pearson, 114 Ala. 630.

[11] Gordon v Ross, 63 Ala. 363; Curry v. Peebles, 83 Ala. 225.

extent a separate proceeding, it is still confined as a proceeding to the parties or their privies; for an original bill in the nature of a bill of review cannot be filed by a stranger who desires to attack a decree for fraud. He is required to file an original bill pure and simple, "not for the purpose of reversing the decree, and having the cause retried, but to vacate it entirely as to him."[12]

§ 634. Leave to file: when necessary.—An original bill in the nature of a bill of review to attack a decree as having been obtained for fraud, may be filed without leave of the court.[13] And a simple bill of review probably may be filed as of right when it seeks to review the decree for error of law, and there is no occasion to suspend execution of the decree; since it was matter of right in English practice when law alone was to be reviewed; and the reasoning that the Code in allowing the chancellor to suspend the decree imports the necessity of his consent to the filing of the bill, is applicable only to bills to review decrees unexecuted.[14] The point may be important when the time for the filing the bill is nearly past and the chancellor is out of reach.

In all cases where the bill of review is based upon new evidence, however, there must be application for leave to file the bill, and notice must be given to the opposing parties; and the granting of the bill rests in the sound discretion of the chancellor. He may refuse it, although the facts if admitted would change the decree, where looking to all the circumstances it would be productive of mischief to innocent parties.[15]

§ 635. Application to be made in three years.—The Code provides that "application to file bills of review must be made within three years after the rendition of the decree, except in cases of infants and persons of unsound mind, who may apply within three years after the termination of their respective disabilities."[16] And by analogy this limitation has been ap-

[12] Curry v. Peebles, 83 Ala 225.

[13] McDonald v. Pearson, 114 Ala. 630, 647.

[14] Planters' & Merchants' Bank v. Dundas, 10 Ala. 661.

[15] Ibid. And see Murrell v. Smith, 51 Ala. 301.

[16] Sec. 3178, Code of 1907.

plied to original bills in the nature of bills of review.[17] But if application to file a bill of review is made before the expiration of three years it is not necessary that the bill be actually filed until after that time; and the failure to give notice is waived by the opposing party unless objection is taken before the chancellor; objection comes too late in the Supreme Court.[18]

§ 636. Bills of review for newly discovered evidence.— When the ground for the review is newly discovered evidence, the chancellor will not reverse the decree merely because the additional evidence was unknown to the plaintiff when the suit was first tried, if the facts were capable of being discovered by him on reasonable inquiry before the decree was rendered.[19] And the decree to which he would be entitled by the evidence taken with the evidence already in the cause, must "be different—beneficially different, from that rendered in the case."[20] Moreover the burden is upon the plaintiff to establish that facts made the foundation of the former decree were not proven; for all presumptions are indulged in support of the former decree.[21]

§ 637. Bills of review for error apparent in the record.— When the bill of review is based upon error of law apparent in the record, it cannot lie after the decree has been affirmed on appeal; else the chancellor could reverse the decree of the appellate court.[22] And it is strictly limited to errors apparent "in the face of the pleadings, proceedings, and decree."[23] The court cannot look to see if there was error in the admission of evidence, or whether there was evidence to support the decree, although such matters would be reviewable on appeal.[24] In England only matters apparent on the face of the decree were reviewable; but our courts early abandoned that limita-

[17] Gordon v. Ross, 63 Ala. 363.

[18] Mitchell v. Hardie, 84 Ala. 349.

[19] Waring v. Lewis, 53 Ala. 615, 625; Banks v. Long, 79 Ala. 319.

[20] Per Haralson, J., in Allgood v. Bank of Piedmont, 130 Ala. 237, citing Banks v. Long, 79 Ala. 319.

[21] Winkleman v. White, 147 Ala. 481; George v. George, 67 Ala. 192.

[22] Stallworth v. Blum, 50 Ala. 46.

[23] Per Denson, J., in B'ham Realty Co. v. Barron, 150 Ala. 232.

[24] Ashford v. Patton, 70 Ala. 479.

tion, because the English decree recited the facts upon which it was based, while our decrees usually do not.[25] And the Supreme Court now say, "we adopt the rule that on the question of error apparent that will justify a bill of review, it is permissible to consult all the facts which are apparent in the pleadings, in the process and its service, in orders, reports confirmed, and opinions and decrees of the chancellor."[26] But the errors relied on must be distinctly pointed out, and no others will be considered on the review.[27]

§ 638. Difference between review and rehearing.—The question, arises, therefore, what is the difference between the scope of a bill of review and that of a rehearing of the cause, and that of an appeal. First as to the rehearing: under Chancery Rule 81, which prescribes the practice as to rehearings, the application must be made during the term in which the decree was rendered, whereas a bill of review may be presented at any time within three years. Again, the facts, if they do not appear on the record, must be sworn to; although that difference is unimportant. But the important difference is that the granting of a rehearing in entirely discretionary with the chancellor, and his refusal will not be reviewed by the Supreme Court;[28] whereas although, as we have seen, the chancellor has large discretion in ruling upon bills of review, his rulings are often reviewed by the Supreme Court.

§ 639. Difference between bill of review and appeal.—The difference between the scope of a bill of review and an appeal to the Supreme Court is of course to be drawn only between appeals and bills of review for error apparent in the record; and that distinction has been so completely drawn by Chief Justice Brickell that it is best to quote his exact language. He said:[29] "There is much of difficulty in defining the errors of law apparent on the face of the decree which will support a

[25] Planters' & Merchants' Bank v Dundas, 10 Ala. 661.

[26] Per Stone, C. J. in Smyth v. Fitzsimmons, 97 Ala. 451, quoting McDougal v. Dougherty, 39 Ala. 409, 428. And see Jordan v. Hardie, 131 Ala. 72; Taylor v. Crook, 136 Ala. 354, 377.

[27] McCall v. McCurdy, 69 Ala. 65, 72.

[28] Ex parte Gresham, 83 Ala. 359.

[29] McCall v. McCurdy, 69 Ala. 65, 69.

bill of review. The bill partakes of the nature of a writ of error, or of an appeal, in our system the substitute for a writ of error. Though of the nature of a writ of error, which is said to have led to its introduction into the practice and procedure of courts of equity, and though each is a remedy for the revision and correction of errors in final decrees, it cannot be said they are concurrent and co-extensive remedies. The errors upon which a bill of review may be founded, would be open to examination and correction on a writ of error. There are, however, errors which will support the writ, not available as a basis for the bill. On a writ of error, the whole record is drawn under the consideration of the court, and advantage may be taken of all errors or irregularities which may have intervened in the course of the proceedings, if they have not been waived, as well as errors apparent. The error of the decree in any respect, whether it be of law or of fact, is open to inquiry and to correction. The errors which will support a bill of review are errors of the law apparent on the face of the decree. There must be error in substance, of prejudice to the party complaining, apparent on the face of the pleadings, proceedings, or decree."

"Though it is said error apparent exists when the decree is at variance with the forms and practice of the court, it must not be understood that the bill can be maintained because of matter of form, or that the propriety of the decree can be questioned."

"Comparing the decree with the pleadings and other proceedings, it must be apparent that the court has reached and declared an erroneous conclusion of law as to the rights of the parties. Whatever of error other than this which may have intervened—errors in the regularity of the proceedings, erroneous deductions from the evidence—must be corrected by writ of error, or by appeal; it is not the office of a bill of review to inquire into and correct them."

§ 640. Frame of bill of review and defense.—Finally as to the frame of the bill of review and the common defense to it. When the bill is based upon error apparent in the record, the bill should be confined to the record in the original proceeding. No defensive matter can be set up, for instance, by a

defendant in the original suit as ground for a bill of review when it was an existing defense at the time of the suit and was not then set up.[30] Therefore the frame of the bill of review consists of the recitation of the proceedings in the original suit. It is necessary to give the substance of the original bill, the prayer verbatim, the substance of the answer, and all the proceedings except the evidence upon which the court found the facts; and the decree should be given in full. Moreover the important parts of a will or other writing construed should be given in haec verba.[31] For the court will consider only the errors shown clearly to have been made.

When the bill of review is based upon new evidence and not upon error existing in the record, of course the gist of the bill is the new evidence; but even then it will be necessary to set out enough of the proceedings to show that the decree would be beneficially different from the one that was rendered upon the original trial of the cause.[32]

The defense to a bill of review is usually by demurrer. And while no Alabama decision has said so, it will be found that most of the decisions have been rendered upon that method of defense.

Formerly a motion to dismiss for want of equity was also available; but now that that motion is abolished, the general demurrer will be used in its stead.

[30] Thorington v. Thorington, 111 Ala. 237.

[31] Goldsby v. Goldsby, 67 Ala. 560.

[32] See § 636, supra.

CHAPTER XXXI.

Cross-Bills.

§ 641. Definition.—A cross-bill is an action introduced by a defendant to a suit in equity in order to repel the plaintiff's suit, by praying discovery or relief in turn against him on account of the same transaction as that brought forward in the bill, as when the defendant sets up a lien upon land claimed by the plaintiff;[1] or it is instituted in order to avoid a separate suit against the plaintiff, when the defendant would be entitled to certain relief arising from the transaction which the plaintiff makes the basis of the bill, if the plaintiff is entitled to the relief sought by the bill;[2] or it is instituted by one defendant against another defendant, when the relief so sought should be granted as a part of the whole transaction, being necessarily involved in it.[3] And for this last purpose a defendant may bring into the litigation by his cross-bill persons not brought in by the plaintiff.[4]

But if the relief sought by the defendant of the plaintiff is not repellant of the relief sought by the original bill, a cross-bill will not lie;[5] except perhaps under the Alabama statute.[6]

§ 642. Cross-bill not entirely a defense.—But it must not be concluded that a cross-bill is entirely a defense because

[1] Langdell Eq. Pl. § 115; Sykes v. Betts, 87 Ala. 537; Beall v. McGhee, 57 Ala. 438; Goodwin v. McGhee, 15 Ala. 232. But by statute in Alabama debts may be set off which do not grow out of the same transaction as that set out by the bill. McKinley v. Winston, 19 Ala. 301; Cotton v. Scott, 97 Ala. 447.

[2] Ashe-Carson Co. v. Bonifay, 147 Ala. 376.

[3] Brickell, C. J., in re Tallassee Mfg. Co., 64 Ala. 567, 601, said: "If there are opposite interests between co-defendants, the determination of which is necessary to a complete final decree upon the subject matter of the suit, a cross-bill must be filed; and the court will stay proceedings and direct it to be filed." And see Gilman v. N. O. & S. R. R. Co., 72 Ala. 566.

[4] Coster v. Bank of Georgia, 24 Ala. 37; Paulling v. Creagh, 63 Ala. 398.

[5] Per Stone, J., in Tutwiler v. Dunlap, 71 Ala. 126, 131, citing earlier cases.

[6] Sec. 3118, Code of 1907.

it is frequently so used. The underlying principle of it would seem to be the settlement of all matters involved in the subject matter of the bill, rather than the mere repulsion of the plaintiff's demands. The latter would seem to be incidental. In an early opinion the Supreme Court, summarizing the uses for cross-bills, more accurately pointed out that "A cross-bill is a mode of defense, to which a defendant resorts when he seeks some discovery, or asks relief touching the subject matter of the original bill. * * * It is true, the allegations of the cross-bill must relate to the subject matter in controversy in the original bill; but the rule does not, as is supposed, * * * restrict * * * its office so as to confine it to the issues in the original cause. Thus, a cross-bill has been allowed to answer the purpose of a plea puis darrein continuance at the common law. So also, for obtaining equitable set off; and to rescind a contract, where the original bill sought to enforce a lien for the purchase money; or to establish and confirm a conveyance, where the original bill sought to set it aside."[7]

A cross-bill is most frequently made use of as a defense, because the attitude of a defendant without a cross-bill is "repellant only," not offensive;[8] and if the plaintiff's suit involves any obligations to the defendant, the defendant will better protect himself against the plaintiff by claiming them. But if a cross-bill served for that purpose alone, there would be no propriety in using it to settle involved litigation between co-defendants.

§ 643. When defendant may obtain relief without cross-bill.—The question then arises why, apart from statute, a cross-bill is not used to obtain relief against the plaintiff which is not inconsistent with the full relief sought by him.[9] To this the answer suggests itself that a cross-bill in such instances is unnecessary. And while no complete declaration to that effect has been found, it would seem to underlie the several instances in which relief was obtainable against a

[7] Per Chilton, J., in Nelson v. Dunn, 15 Ala. 501.

[8] Ward v. Bank of Abbeville, 130 Ala. 597.

[9] See language of Mitford, quoted by Stone, J., in Davis v. Cook, 65 Ala. 617.

plaintiff under the English practice, and recognized in Alabama, upon the answer alone.[10] They were three; 1, where the plaintiff sought an account, and the result of the account showed a balance in favor of the defendant; which was decreed to him at once;[11] 2, where the plaintiff sought the specific performance of a contract, and the proof showed a modified contract, the performance of which by the plaintiff was rather the right of the defendant, and which the defendant was accorded without the asking;[12] and 3, where the plaintiff sought to redeem from a mortgage, and the defendant showed that the plaintiff was not entitled to redeem, in which case the defendant was given a decree of foreclosure.[13]

The principle upon which all these so-called exceptions are based is that the plaintiff must offer to do equity when he seeks equity of the defendant. And it would seem that this principle would apply even more aptly to any case, in addition to the exceptions, where the plaintiff should turn out to be due some relief to the defendant not inconsistent with the relief sought for himself.

It has already been applied by the court to cases involving the marshalling of assets.[14]

§ 644. Generally no affirmative relief obtainable without cross-bill.—But aside from the above established exceptions, it has been reiterated by our Supreme Court many times that no affirmative relief is grantable without a cross-bill.[15] Indeed it has been said that nothing but costs may be obtained on the answer alone.[16] So it would not be safe to rely solely upon

[10] Langdell Eq. Pl. §§ 122, 123.

[11] Compare § 3219, Code of 1907; Branch Bank of Mobile v. Strother, 15 Ala. 51.

[12] Sims v. McEwen, 27 Ala. 184; Billingsley v. Billingsley, 37 Ala. 425. But where the plaintiff seeks a recision of the contract, the defendant cannot obtain without cross-bill a decree for the balance of the purchase money. Gallagher v. Witherington, 29 Ala. 420.

[13] Mooney v. Walter, 69 Ala. 75. But see Ross v. New Eng. Mtge. Sec. Co., 101 Ala. 362.

[14] In re Tallassee Mfg. Co., 64 Ala. 567.

[15] Ashe-Carson Co. v. Bonifay, 147 Ala. 376; Hendrix v. So. Ry. Co., 130 Ala. 205; Bedell v. New Eng. Mtge, &c., Co., 91 Ala. 325; Watts v. Eufaula Nat. Bank, 76 Ala. 474.

[16] Harris v. Carter, 3 Stewart 233; Ketchum v. Creagh, 53 Ala. 224.

the plaintiff's obligation or offer to do equity in any case different from those already decided.

§ 645. Alabama statutory cross-bills.—Under the English practice, as well as our own, it has always been important to avoid cross-bills, when unnecessary, because they involved the issue of summons to all the persons made defendants to them; and therefore publication to non-resident plaintiffs and defendants who had not appeared in the cause. The Code of 1907 has made a very valuable improvement upon the practice by providing, at least with regard to the answer when made a cross-bill, that it shall not be necessary to issue a summons to any defendant in the cross-bill except those who are not complainants in the original bill;[17] and this avoids the delay incident to cross-bills against the plaintiff; but it still leaves the difficulty attendant upon cross-bills against co-defendants, especially when some of them are non-residents. But perhaps that is most conducive to justice.

It will be noted that section 3118 of the Code provides that "a defendant may obtain relief against a party complainant or defendant for any cause connected with, or growing out of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed." This would seem beyond question to give the defendant the right to obtain of the plaintiff other relief than that inconsistent with the relief sought by the bill; so if a cross-bill is in truth only a defense, an answer made a cross-bill is certainly not so limited in its scope.

The defendant must pray that the answer be taken as a cross-bill, however; and as such it must be heard with the original bill.

The proceedings upon the answer as cross-bill are in the main the same as upon an original suit.[18] It may be demurred to as an original bill;[19] and it must be answered "under the rules and regulations" provided for original bills, under oath or not as the plaintiff elects.[20] But the decree upon the de-

[17] Sec. 3118, Code of 1907.

[18] Sec. 3119, Code of 1907.

[19] Ex parte Woodruff, 123 Ala. 99.

[20] Formerly a decree pro confesso could not be taken upon an answer made a cross-bill. Lehman v. Dozier, 78 Ala. 235. But

murrer to the cross-bill is not an interlocutory decree which may be appealed from as such;[21] although it may be assigned as error on appeal from the final decree in the cause.[22] And it is error to dismiss a cross-bill in vacation without giving opportunity for amendment.[23]

§ 646. Relief to defendant distinguished from defense.—It being accepted that as a rule the defendant can obtain affirmative relief in a cause instituted by the plaintiff, solely by filing a cross-bill, or by making his answer a crossbill, of course he should never fail to pray for cross-relief if there is any ground to construe his defense as requiring it; for while the cross-bill will be dismissed at the defendant's cost if it was not needed,[24] if it was needed and was omitted, a petition to be allowed to file it will probably come too late after final decree.[25]

But if the delays attendant upon a cross-prayer have led the defendant to omit it, or if through mistake or inexperience he has omitted it any way, the court may have to determine whether a given defense is merely repellant or amounts to affirmative relief. And the dividing line is not always drawn without difficulty.

The recognized rule is that matters in discharge or payment of the plaintiff's claim may be set up and availed of by an answer only, but that matters supporting a set-off of a counter claim or a recoupment against the plaintiff require a cross-bill.[26] But sometimes it is hard to decide whether the defense

that has been changed by § 3119 of the Code as to answers made cross-bills.

[21] Jones v. Woodstock Iron Co., 90 Ala. 545; Festorazzi v. St. Joseph's Catholic Church, 96 Ala. 178.

[22] Ex parte Woodruff, 123 Ala. 99.

[23] Kyle v. McKenzie, 94 Ala. 236.

[24] Gilman v. N. O. & S. R. R. Co., 72 Ala. 566; McDaniell v. Callan, 75 Ala. 327. But if the facts made the foundation of the cross-prayer are in the answer as an answer, the discharge would seem to be effective notwithstanding the cross-bill. Taunton v. McInnish, 46 Ala. 619, 623. So that if the cross bill is a statutory cross-bill, it is harmless if it turns out to be unnecessary.

[25] Malone v. Carroll, 33 Ala. 191.

[26] Goodwin v. McGhee, 15 Ala. 232; Taunton v. McInnish, 46 Ala. 619; Pitts v. Powledge, 56 Ala. 147; Cotton v. Scott, 97 Ala. 447; Tatum v. Yahn, 130 Ala. 575.

is the one or the other. Formerly it was held in suits seeking to enforce vendors' liens, that the defense of failure or part failure of consideration owing to the defect of title might be claimed by an answer alone.[27] But in subsequent cases it has been held that this defense is available only by cross-bill.[28] On principle it would seem that the earlier decisions were correct, and that the abatement of the purchase price should be a condition of the plaintiff's obtaining his equity. Indeed the opinion in the last case indicates that the abatement could be accorded the defendant without a cross-bill if the plaintiff's bill contained an offer to do equity.[29]

It is evident, therefore, that the necessary scope of a cross-bill is largely a matter of degree.

§ 647. Scope of cross-bills.—The scope of cross-bills was stated very clearly by Chief Justice Stone;[30] and it is well to quote his language: "It must relate to and be connected with the subject of the original bill, and can bring in no new matter entirely foreign to it, except, perhaps, in cases of set-off against an insolvent complainant." "The subject and purpose of the cross-bill must be germane to the original bill."[31] Moreover the answer and cross-bill must not be inconsistent, as where one repudiates a payment of a debt, and the other seeks relief upon a ratification of it.[32]

But the cross-bill may raise new issues to those in the original bill; and when it raises issues between co-defendants only, it must frequently present new matter connected with those

[27] Hughes v. Hatchett, 55 Ala. 539; Pitts v. Powledge, 56 Ala. 147.

[28] Moore v. Ensley, 112 Ala. 228; Cotton v. Scott, 97 Ala. 147; Woodall v. Kelly, 85 Ala. 368; Tedder v. Steele, 70 Ala. 347.

It may be also noted that the two most recent decisions say nothing about the necessity for the defendant, when in possession of the land upon which the vendors' lien is claimed, to allege as a basis for his cross-bill, that the plaintiff is insolvent. The other decisions held that allegation necessary.

[29] Moore v. Ensley, 112 Ala. 228.

[30] Whitfield v. Riddle, 78 Ala. 99.

[31] And see Cont. Life Ins. Co. v. Webb, 54 Ala. 688; Grimball v. Patton, 70 Ala. 626; O'Neill v. Perryman, 102 Ala. 522; Meyer v. Calera Land Co., 133 Ala. 554.

[32] Williams v. Jones, 79 Ala. 119. And see Dill v. Shahan, 25 Ala. 694; Hanchett v. Blanton, 72 Ala. 423.

issues and not with the issues presented by the plaintiff's bill.[33] But of course the new facts must be dependent upon the general facts presented by the original bill.

§ 648. Cross-bill need not contain separate equity.—It is not necessary that a cross-bill have equity apart from the original bill; since any cross demand to which the defendant is entitled against the plaintiff and growing out of the matters set up by the original bill, may be set up by cross-bill, and such a cross demand may be in itself purely legal.[34]

§ 649. When cross-bill dismissed with original bill.—But if the cross-bill does not contain equity in itself apart from the original bill, and the original bill is dismissed, the cross-bill falls with it; since it is in such case dependent upon the plaintiff's establishing his right to some relief.[35] The rule is, "when the cross-bill sets up, as it may, additional facts relating to the subject matter, not alleged in the original bill, and prays for affirmative relief against the complainant, in a matter which is the subject of the original bill, if such cross-bill present a subject of equitable cognizance, the dismissal of the original bill does not dispose of the cross-bill. The latter remains for disposition, as if it had been filed as an original bill."[36] This rule was originally applied to a cross-bill against the plaintiff, not against a co-defendant, and the cross-bill in the particular case in which it was laid down[37] was an answer made a cross-bill under the statute. At that

[33] Davis v. Cook, 65 Ala. 617.

[34] Nelson v. Dunn, 15 Ala. 501; Winn v. Dillard, 60 Ala. 369; Davis v. Cook, 65 Ala. 617.

[35] Meyer v. Calera Land Co. 133 Ala. 554; McGlathery v. Richardson, 129 Ala. 653; Etowah Mining Co. v. Wills Valley Mining Co., 121 Ala. 672; Continental Life Ins. Co. v Webb, 54 Ala. 688.

[36] Per Stone, J., in Wilkinson v. Roper, 74 Ala. 140. It may be doubted whether this practice was possible in England. Mr. Justice Stone cites American cases only; and it is said in the books that a cross-bill is a mere auxiliary suit, or a dependancy upon the original suit. Story Eq. Pl. § 399; 3 Daniell Ch. Pr. 1747.

Wilkinson v. Roper has been followed in Abels v. Planters' & Merchants' Ins. Co., 92 Ala. 382, and in Webster v. Debardeleben, 147 Ala. 280; and it has been cited as law in Etowah Mining Co. v. Wills Valley Mining Co., 121 Ala. 672, and Meyer v. Calera Land Co., 133 Ala. 554.

[37] Wilkinson v. Roper, 74 Ala. 140.

time it was not possible for an answer to be made a cross-bill against a co-defendant, a separate cross-bill being necessary for one defendant to obtain relief against another defendant, unless by agreement of record.[38]

But after the statutory cross-bill was extended so that an answer could be made a cross-bill against a co-defendant, as at present, it was held that the same rules govern the filing of a cross-bill against a co-defendant as against the plaintiff; and such a cross-bill may survive, if it contain separate equity, after the original bill is dismissed.[39]

§ 650. How far cross-bill a separate suit.—While a cross-bill has always been considered a part of the original suit, so that the two constitute but one cause,[40] it has nevertheless characteristics of a separate suit in some important respects. And its individual character is indicated in more lines than its survival upon the dismissal of the original bill. Thus a cross-bill when instituted must be pressed, and if the defendant after filing it takes no steps to compel an answer to it, but goes to trial upon the original cause without the cross-bill being answered, the cross-bill may be treated as waived.[41] And where after a final decree dismissing an original bill carrying with it a cross-bill, the original plaintiff appealed and secured the reversal of the cause, this did not reinstate the cross-bill; but as the cross-bill was filed by an infant, the Supreme Court remanded the cause that the infant's protector might file another cross-bill to obtain relief incident to the reversal of the decree as to the original bill.[42]

But a cross-bill is sufficiently a part of the original cause to be cut off at the will of the plaintiff if he amends the original bill by striking out the party defendant who filed the cross-bill. The cross-bill is then out of court, and the defendant filing it can neither make motion nor take appeal in the cause.[43]

[38] Lehman v. Dozier, 78 Ala. 235; Trimble v. Farris, 78 Ala. 260.

[39] Abels v. Planters' & Merchants' Ins. Co., 92 Ala. 382.

[40] 3 Daniell Ch. Pr. 1743.

[41] Hudspeth v. Thomason, 46 Ala. 470.

[42] Parks v. Parks, 66 Ala. 326.

[43] Vandeford v. Stovall, 117 Ala. 344.

CHAPTER XXXII.

Bills for Injunctions.

§ 651. Practice changed by Code of 1907.—The practice in obtaining injunctions in Alabama prior to the Code of 1907 was subject to grave objection, due chiefly to its being too great an abbreviation of the old English practice. The English practice contemplated three hearings before the injunction was made permanent; the first was ex parte, of course, on the presentation of the bill; the second was the preliminary hearing on the filing of the answer or motion to dissolve, at which hearing both parties would appear; and the last was the final hearing of the cause upon pleadings and proof. If the injunction was granted upon the ex parte application, it was granted "till answer or further order"; because the defendant was expected to move to dissolve it either before or after his answer was filed. Then if it was not dissolved on the hearing of that motion, it would be continued to the final hearing of the cause; when it was made permanent, or continued, or the bill dismissed, according as the right to the injunction was supported by the testimony and justice required.[1] And this is substantially the practice also in the federal courts of the United States.[2]

But in Alabama prior to the Code of 1907, the practice was to present a bill for an injunction to the judge of any circuit court or of the Supreme Court or to any chancellor, praying an issue of the writ of injunction, if an immediate injunction was desired, the writ to be returnable to some particular court of chancery jurisdiction, and to give bond to pay full damages if the injunction proved to be wrongfully sued out. The defendant then might move for the dissolution of the injunction, or rely upon the bond as he saw fit, until the hearing of the cause and the equities and the facts were determined.

[1] 3 Daniell Ch. Pr. 1894, et seq.

[2] See Equity Rule LV, of U. S. Courts, and Revised Statutes U. S. §§ 718, 719, providing restraining orders.

The chief defects in this practice were the peril to the plaintiff from his liability on a bond given before his equity was determined, and the hardship upon the defendant of being enjoined always without notice; not to speak of the difficulty to the court of deciding the preliminary equities. But the Code of 1907 has materially changed all this.

§ 652. New practice.—The Code of 1907 provides that when a bill praying the immediate issue of a writ of injunction is to be presented to a judge or chancellor authorized to direct its issue, "he may, if in his opinion no substantial injury would result to the complainant from delay, set a time and place for the hearing of the application, not more than ten days thereafter," and may require the plaintiff to give the defendant at least three days' notice of the time and place, and to serve him with a copy of the bill if the defendant is within the State; and if the defendant cannot be found within the prescribed time, the judge at his discretion may continue the hearing.[3] But pending the preliminary hearing the judge may issue at his discretion a restraining order, if the plaintiff desires it and is willing to give bond.[4]

When the defendant has been found and served with notice of the application, he may file his sworn answer immediately, if he chooses, and have it considered at the preliminary hearing along with the bill, which must also be sworn to. The judge must then determine at the preliminary hearing upon the bill and answer, if an answer is filed, and upon such affidavits of other persons as the parties may introduce, whether the preliminary injunction should be granted or refused. And when an injunction is once granted after such a hearing, no motion to dissolve it will lie as a matter of right except for matters subsequently occurring.[5]

The judge must indorse upon the bill his decision for or against the injunction, requiring the usual bond if he directs the issue; and an appeal will lie to the Supreme Court if taken within ten days.[6]

[3] Sec. 4528, Code of 1907.
[4] Sec. 4533, Code of 1907.
[5] Secs. 4529, 4532, 4533, Code of 1907.
[6] Secs. 4530, 4531, Code of 1907.

It is also provided that when notice of the hearing is required by the judge, the plaintiff may withdraw his application, and apply at once to a judge of the Supreme Court instead of awaiting the court's conclusion at the provisional hearing;[7] but of course this recourse will never be availed of unless the judge refuses to grant a restraining order.

When a motion to dissolve the injunction is properly made upon subsequent occurrences, the court may consider the defensive allegations in the sworn answer, and also such affidavits as may be introduced by either party, as well as the denials by the answer of the allegations of the bill.[8] And if the injunction is dissolved, no reinstatement bond need be fixed for an appeal; but if the chancellor refuses upon request to fix such a bond, the plaintiff may have it fixed by a judge of the Supreme Court.[9]

It is apparent that all these new provisions are greatly beneficial to the practice

§ 653. Kinds of injunctions, and liability upon bond.—While it cannot be attempted to discuss here the grounds upon which injunctions should be applied for, it is necessary to note that all injunctions must fall within three classes. Either they enjoin proceedings upon judgments already obtained at law, or they enjoin proceedings upon claims recognized as beyond the range of defenses available at law, or they restrain anticipated or continued acts by the defendant; which latter usually involve torts to the plaintiff by reason of injury to his property.[10]

For the first and second kinds of injunction a decision on the equities requires no collateral issue, and the right to the writ may be determined almost to a certainty at the preliminary hearing; since the facts constituting the equity, if equity there be, are not usually in much doubt.[11] The bond therefore

[7] Sec. 4534, Code of 1907.

[8] Sec. 4535, Code of 1907.

[9] Sec. 4536, Code of 1907.

[10] For a full discussion of the range of injunctions in modern law, see Spelling on Injunctions and other Extraordinary Remedies, 2nd ed., Chapters II, III, IV, VI and VII.

[11] The case of Southern Steel Co. v. Wiley Hopkins, 47 So. Rep. 274, in which an injunction was sought against many personal injury cases on the ground of an

required for an injunction against a judgment involves little peril after the preliminary hearing under the new practice.[12] And even the third kind of injunction, which frequently required collateral issues at law under the English practice, because the fact of a tort or of a nuisance as alleged in the bill had to be determined before an injunction could issue, is put much more within the reach of the average plaintiff by the new practice; because as we have seen the chancery court in Alabama can determine all the facts without a collateral issue of any kind,[13] and at the new preliminary hearing affidavits may be presented as well as the pleadings in the cause. So while a bond is still necessary in all cases, before the writ of injunction can issue,[14] the danger of a dissolution on the final hearing and therefore of a liability upon the bond, is greatly reduced.

§ 654. The bond.—A bond is always necessary to the issue of an injunction, unless it be a permanent injunction granted in a final decree after the hearing upon pleadings and proofs.[15] But while the issue of a writ of injunction before the filing of the bond is improper, an opportunity to give the bond will be allowed before the discharge of the writ.[16] Without a decree dissolving the injunction or discharging the writ there is no breach of the bond;[17] but such a decree always entitles the defendant to damages, even if nominal damages only;[18] and always entitles him to his counsel fees incurred in the proceeding.[19] And the register may issue execution for costs, if decreed against the party obtaining the injunction, against any or all parties to the bond.[20] Moreover, if the injunction was of the first kind above pointed out, namely, to stay proceedings on a judgment at law, and the injunction is dissolved

alleged common defense against them all, is of course exceptional.

[12] Secs. 4515, 4516, Code of 1907.

[13] Farris v. Dudley, 78 Ala. 124, 129; Whaley v. Wilson, 112 Ala. 627. And compare §§ 599, 660, ante.

[14] Sec. 4517, Code of 1907.

[15] Jesse French, &c., Co. v. Porter, 134 Ala. 302, 307.

[16] Thorington v. Gould, 59 Ala. 461; Jones v. Ewing, 56 Ala. 360.

[17] May v. Walter, 85 Ala. 438.

[18] Rosser v. Timberlake, 78 Ala. 162.

[19] Ibid. And see Jackson v. Millspaugh, 100 Ala. 285.

[20] Sec. 4524, Code of 1907.

at the final hearing, the chancellor may decree six per cent on the amount of money the judgment for which was enjoined, as damages for delay.[21] And it is provided that whenever an injunction against a judgment is dissolved, the bond "has the force and effect of a judgment" without more; and the register may certify it to the clerk of the court in which the judgment was rendered, for him to issue execution on it for the amount of the judgment, interest, and damages against any or all the obligors.[22]

But when the injunction against the judgment is dissolved by an interlocutory decree, the chancellor must require of the defendant a refunding bond, upon which a final decree may be rendered at the final hearing of the cause if a permanent injunction should happen to be granted.[23]

§ 655. Motion to discharge or to dissolve: when made and heard.—There is a distinction between a motion to discharge an injunction, and a motion to dissolve it. A motion to discharge an injunction is proper when on any account the writ was irregularly granted; whereas a motion to dissolve an injunction, if not coupled with a motion to discharge, whether upon the bill alone, or upon the bill and a sworn answer, waives such irregularities, and relies upon the want of equity in the cause.[24] Moreover formerly no appeal lay from a decree upon a motion to discharge; but now it lies from either motion.[25]

A motion to dissolve or a motion to discharge an injunction or for both purposes, provided it is proper under the new practice as above pointed out, may be made either in vacation upon ten days' notice, or in term time upon one day's notice; but if the cause is ready for hearing upon the merits, the court must proceed with the hearing without taking up the motion separately. And if the motion is to dissolve, and there is on file a demurrer to the bill for want of equity, or exceptions to the answer, they must all be considered at the same time with

[21] Sec. 4522, Code of 1907.
[22] Sec. 4523, Code of 1907.
[23] Sec. 4525, Code of 1907.
[24] Jones v. Ewing, 56 Ala. 360; E. & W. R. R. Co. v. E. T. V. & G. R. R. Co., 75 Ala. 275; Ex parte Sayre, 95 Ala. 288.
[25] Sec. 2839, Code of 1907; Ex parte Fechheimer, 103 Ala. 154.

the motion. But even if there is no demurrer on file, of course the chancellor must dismiss the bill if it lacks equity.[26]

§ 656. Injunction may be granted before filing of bill.—It has been law since the Code of 1896, that "it is not ground of objection to an injunction that the order granting the same was made prior to the filing of the bill."[27] But under the new practice it is not likely that this situation will in future frequently occur; as it is believed that notice of a preliminary hearing together with a copy of the bill for the defendant will be the common practice, preceded by a temporary restraining order in cases of exigency.

[26] Sec. 4526, Code of 1907; [27] Sec. 4527, Code of 1907. Chancery Rule 96.

CHAPTER XXXIII.

Of the Administration of Estates in Chancery.

§ 657. Peculiar practice involved.—While the subject of the assumption by the chancery court of jurisdiction of the administration of the estate of a deceased person is primarily a matter of equity jurisdiction, the jurisdiction of chancery in Alabama over estates has been extended by decisions of the Supreme Court until the practice incidental to the jurisdiction has become peculiar. Therefore the subject of the administration of estates in chancery requires special treatment in a work on Alabama chancery practice, for the reason that many points involved in the practice connected with it have not been treated in general text books upon the administration of estates.

In discussing this subject, however, the examination will be limited as far as possible to the points peculiar to Alabama; since the peculiarities of the practice involved in such suits seem to arise solely from the peculiar jurisdiction over estates which have been acquired by chancery courts in Alabama.

§ 658. Jurisdiction of chancery over estates in Alabama.—The chancery court in Alabama has jurisdiction over the administration of an estate in Alabama at the suit of the executor or administrator or other person interested in the estate whenever the bill shows that equities or equitable questions are involved in the administration which cannot be adjudicated by the court of probate as a common law court.[1] And of course this is not peculiar to Alabama; since in England the chancery court had jurisdiction of the administration of estates as quasi-trusts, when the questions presented by the

[1] Hurt v. Hurt, 47 So. Rep. 260, is the last reported case involving the point; but the decisions are numerous, as will appear from the line of cases given later. A guardianship may be similarily removed into chancery for settlement. Spidle v. Blakeny, 151 Ala. 194. And an administration may be taken into chancery for settlement, at the suit of a partner of the deceased, upon the same principle. Dickens v. Dickens, 45 So. Rep. 630.

suits involved the construction of trust obligations or the breach of trust duties.[2]

But the jurisdiction of chancery in England at the suit of a legatee or beneficiary of the estate of a decedent, as will appear from the history of the jurisdiction of our own courts, was limited to bills to compel a settlement or distribution of the estate when the executor or administrator was ready but unwilling to do so, and bills complaining of the administrator for some other breach of duty. Whereas in Alabama a legatee, a devisee, a beneficiary, an heir, one of the next of kin, or even a creditor of the decedent whose estate is in process of administration can take the administration into the chancery court upon a bill filed to that end at any period of the administration, even though the executor or administrator is strictly doing his duty and the time for distribution has not arrived. And the bill need allege no other ground for the prayer than the plaintiff's interest in the estate.[3] This seems to be peculiar to Alabama and entails much procedure not involved in the administration of estates when the estate is ready to be settled and all preliminary matters have been disposed of. The situation will be best understood after tracing the history of the jurisdiction of the chancery court in Alabama over the administration of estates of deceased persons.

§ 659. History of Alabama chancery jurisdiction of estates. —The early cases did not depart from the English law. It was said that "a court of equity will entertain a bill for a personal legacy or for the distribution of the intestate's personal estate, and will compel an executor or administrator in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them."[4] But if a final settlement had begun in the probate court, it was

[2] McNeill v. McNeill, 36 Ala. 109, giving the history of English jurisdiction.

[3] Roy v Roy, 48 So. Rep. 793 (Feb. 1909); Dickens v. Dickens, 45 So. Rep. 630; Colquitt v. Gill, 147 Ala. 554; Bresler v. Bloom, 147 Ala. 504; Greenhood v. Greenhood, 143 Ala. 440; Bromberg v. Bates, 112 Ala. 363; Baker v. Mitchell, 109 Ala. 490.

[4] Leavens v. Butler, 8 P., 380. And see the following line of cases: Blakey v. Blakey, 9 Ala. 391; Gould v. Hayes, 19 Ala. 438; McNeill v. McNeill, 36 Ala. 109.

held that the chancery court would not assume jurisdiction, in the absence of some equitable question; since it was needless to compel a settlement when the executor had of his own accord taken steps to make one.[5]

This was therefore the determining element in a case; and it was said that, "Before the jurisdiction of the court of probate to settle an administration and to make division and distribution has been put in exercise, without the assignment of any special cause, devisees or heirs, legatees or distributees may resort to a court of equity for a settlement of the administration, and for the payment of legacies, the distribution of personal assets, and for a division of lands descended or devised."[6]

This language would seem to be qualified by the condition that the estate be ready for distribution or devision, and that the time has arrived for a final settlement, as was the fact in the case in which it was used. But after being quoted in a succession of later decisions, which, however, involved similar facts,[7] it was construed as supporting the right of a person interested to take the administration of an estate into chancery, whether it is ready to be settled or not;[8] and as we have seen, that is the present law.

§ 660. Collateral proceedings incidental to administration.— In Alabama there are several collateral proceedings authorized by statute which are often involved in the proper distribution of the properties of which a person dies possessed. The Code authorizes the probate court to set aside to a widow and minor children of a decedent a homestead or property in lieu thereof, which shall be exempt from liability for the decedent's debts;[9] and the allotment of dower may be accomplished upon statutory petition to the probate court, without pursuing the old common law method or resorting to a special

[5] James v. Faulk, 54 Ala. 184; Teague v Corbitt, 57 Ala. 529.

[6] Brickell, C. J., in Bragg v. Beers, 71 Ala. 151.

[7] Marshall v. Marshall, 86 Ala. 383; Tygh v. Dolan, 95 Ala. 269; Bromberg v. Bates, 98 Ala. 621.

[8] Baker v. Mitchell, 109 Ala. 490, seems to be the first case so holding; the facts in Ligon v. Ligon, 105 Ala. 460, showed that the administrator was in default for not making final settlement.

[9] Secs. 4196-4204, Code of 1907.

bill in chancery.[10] Moreover the probate court is authorized to decree that an estate is insolvent, and to administer it especially as such, when statutory proceedings are instituted to that end.[11]

If these collateral proceedings have not been settled before the estate has been taken into chancery, it necessarily follows that the chancery court must carry them on, or they will have to be abandoned. But if the estate must be ready for settlement before taken into chancery unless some special equity is involved, these proceedings would likely be determined beforehand.

But regardless of that possibility, the Supreme Court have determined as to each of these collateral proceedings, one after another, that they can be conducted as a part of the administration in the chancery court, when that court has once assumed jurisdiction of the administration of the estate.[12] And the Constitution of 1901 provided that if it were necessary in the course of the administration to remove an administrator, or to appoint a new one, the chancery court can do that too.[13]

§ 661. Administration one entire cause.—The effect of these holdings, and of the situation presented by the existence of these statutory proceedings in recognition of rights collateral to the administration of an estate, but essentially involved in it, was to force the conclusion that the administration of an estate is one entire proceeding, merely divided into successive steps. To allow a part of the estate to be transferred into chancery, and to leave a part subject to the orders of the judge of probate, would serve to induce conflicting rights which could but bring on chancery litigation in future. It was therefore decided that "when an administration is removed into the chancery court for any purpose, or in any part, it is there in whole and for all purposes. There can be no splitting up of an administration any more than any other cause of action; it is one proceeding throughout, in a sense,

[10] Sec. 3825, et seq., Code of 1907.

[11] Secs. 2793-2796, Code of 1907.

[12] Jackson v. Rowell, 87 Ala. 689; Tygh v. Dolan, 95 Ala. 269; Henley v. Johnston, 134 Ala. 646.

[13] Constitution of 1901, § 149. The provision applies, of course, only to administrations already in chancery. The Code of 1907 does not refer to it.

and the court having paramount jurisdiction of it must proceed to a final and complete settlement."[14]

§ 662. Practice on removal as to collateral proceedings.— We are now ready for the question what is the practice upon removal of the administration into chancery as to these collateral proceedings? How far must the chancery court in carrying on the administration pursue the statutory forms provided for the probate court?

In Bragg v. Beers[15] Chief Justice Brickell said: "The [chancery] court, proceeding according to its own practice, is governed by and applies the law controlling the settlements of administrations, the distribution of assets, or the partition or division of property, which prevails in the court of probate. The parties lose neither right nor remedy by resorting to a court of equity, instead of invoking the jurisdiction of the court of probate. If to effect a final settlement, distribution, and partition, a sale of land is necessary, the court will order the sale as in all cases in which under like circumstances the court of probate would have had jurisdiction to order it."[16]

This language has been frequently quoted as sustaining the view that only the principal provisions of the probate court procedure are binding upon the chancery court. But what are the principal provisions has not been made entirely clear. In a very recent case the Supreme Court decided that in making sales of property of such estates, the various proceedings leading up to the sale must be strictly in accord with the sections of the Code operative upon sales by administrators in the court of probate. So that not only must an application for authority to sell be filed, but the day for the hearing must be appointed as required by statute; publication must be made anew as to non-residents; there must be a guardian ad litem for that proceeding; and the sale must be in accordance with the statute.[17]

But the only opinion was written by a judge who dissented

[14] McClellan, J., in Tygh v. Dolan, 95 Ala. 269. And see Baker v. Mitchell, 109 Ala. 490.

[15] 71 Ala. 151.

[16] And see Sharp v. Sharp, 76 Ala. 312.

[17] Roy v. Roy, 48 So. Rep. 793.

from the remainder of the court; so the views of the majority as to other matters of procedure has not yet been declared.

§ 663. How far are administration proceedings in rem?—The interesting question is sooner or later to be presented to the Supreme Court, whether the removal of the administration of an estate from the probate court into the chancery court, deprives the proceedings of their character, recognized in the probate court, of proceedings in rem rather than in personam.[18] The question is far reaching, because if an administration in chancery is a proceeding in rem, other proceedings of the same nature, as partition proceedings, will be hard to distinguish. The language of the dissenting opinion in Roy v. Roy,[19] pointing out the inapplicability to such proceedings of the sections of the Code protecting non-residents against whom decrees pro confesso have been taken without personal service, tends to the theory that they are all proceedings in rem; but how far the courts will go in that direction cannot be foretold.

[18] Lyons v. Hamner, 84 Ala. 197; Moore v. Cottingham, 113 Ala. 148. And the decisions are numerous.

[19] 48 So. Rep. 793.

CHAPTER XXXIV.

Bills for Discovery, for Discovery and Relief, and Creditor's Bills.

§ 664. Scope of bills for discovery in Alabama.—The scope of bills for discovery in Alabama has been so widened by the use of the term "bill for discovery" in statutes conferring new rights upon creditors seeking to subject the property of fraudulent debtors to the payment of debts, that the accepted meaning of the term has very materially changed. At present a bill for discovery in our practice would be commonly accepted to mean a bill filed by one or more creditors directed to the collection of their debts by means of equitable intervention. But such bills are not properly bills for discovery.

A bill for discovery in English practice and in the early practice in Alabama, was a bill filed by a plaintiff to ascertain from a defendant by compulsion, facts believed to be within the defendant's knowledge, and which would materially aid the plaintiff in a suit at law, or in another suit in equity to which the plaintiff in the bill of discovery was a defendant. Consequently the bill for discovery was a bill for discovery only.

Such bills for discovery are still in use in Alabama.

§ 665. Bills for discovery explained by Langdell.—Bills for discovery in this true sense used to perform a very important function, and go so deeply into the theory and foundations of equity procedure that they must be clearly understood. Professor Langdell gave the following satisfying explanation of them:—

"At common law, the admissions of a party to a suit were good evidence for the adverse party, but there were no means of compelling him to give admissions. Equity, however, held that there was at least as much reason for compelling a party to disclose what he knew material to a controversy, as for

[1] Langdell Eq. Pl. §§ 126, 127, 128 130.

compelling a witness to do the same thing, and although a party was disabled, by interest, from testifying on his own behalf, this was no reason why he should not admit the truth in favor of his adversary."

"A bill for discovery by a plaintiff at law is framed in the same manner as a bill for relief, with two exceptions or modifications, namely: first, a bill for discovery states the plaintiff's case at law in support of which he seeks discovery, instead of stating a case of which he asks the court of equity to take cognizance; secondly, as a bill for discovery entitles the plaintiff to an answer only, it must not ask for anything else, i. e., it must not pray for relief, nor for a decree (the office of which is to give relief); for, if it does, it will be converted into a bill for relief, and will have to stand or fall as such. When a bill for discovery is filed by a defendant at law, it states the facts which constitute his defense, if the latter is affirmative; if it is negative, it contains allegations or charges of evidence merely."

"Bills for discovery are frequently filed by defendants in equity in aid of their defense, and they are then called cross-bills."

"The defendant may file a cross-bill for discovery as soon as he pleases after the original bill is filed; but he is not entitled to have it answered until he has answered the original bill. Here is another mischief arising from confounding the two elements in an answer, and requiring them both to be combined in one instrument. It is just that the plaintiff should have priority in the matter of discovery, i. e., that he should have discovery from the defendant before being required to give it to the defendant. Yet it is impossible to secure to him this right without compelling the defendant to commit himself irrevocably to a sworn defense, while in total ignorance as to what the plaintiff will admit or deny. The result has been that the plaintiff has been protected in his right, and the defendant has been sacrificed."

§ 666. Alabama statutory abbreviations.—The early Alabama lawyers evidently appreciated fully the value of bills for discovery, and at the same time saw the difficulties pointed out by Professor Langdell. Therefore they attempted

very skillfully to abolish the necessity for resorting to bills for discovery by substituting for them a proceeding which is shorter and at the same time more effective.

First they provided as a method of practice in law courts that either the plaintiff or the defendant can propound interrogatories to the other party upon an affidavit that the answers will be material testimony in the cause.[2] And of course this statutory discovery went far to supplant the old bill in equity. It was held not to abolish it, however; and so the plaintiff may still resort to the bill for discovery if he prefers to do so.[3] Also in recognition of the right of a defendant in equity to file a cross-bill of discovery against the plaintiff to aid in defense of the suit, they provided that after filing his answer, the defendant might exhibit interrogatories to the plaintiff touching the subject matter of the bill or of the defense; and that the plaintiff must answer them within such time as is prescribed by the register upon penalty of having his bill dismissed.[4]

A recent statutory addition gives the plaintiff the right to propound interrogatories to the defendant after issue and to compel him to answer them;[5] but the use for such a practice is not very clear, except as affording an opportunity to make the defendant discover under oath, after having been allowed to defend by answer to the bill without swearing to his pleading, in cases where the oath to the answer is waived. But little benefit is apparent from that application of the practice.

§ 667. Decisions upon bills of discovery. — The Alabama decisions upon bills of discovery proper do not materially change the English practice. It is necessary to swear to the bill.[6] And it is necessary to aver that the discovery sought of the defendant will be material to the plaintiff in

[2] Now § 4049, et seq., Code of 1907.

[3] Horton v. Moseley, 17 Ala. 794.

[4] Sec. 3134, Code of 1907.

[5] Sec. 3135, Code of 1907.

[6] Lawson v. Warren, 89 Ala. 584.

prosecuting or defending the suit at law.[7] A dictum may be found that a bill of discovery may be maintained for merely cumulative evidence;[8] but this is hardly to be supported, as it is certain that the chancellor will not entertain a fishing bill.[9] And the bill must set out, as was said by Professor Langdell, the cause of action or the defense at law which is to be aided by the discovery.[10] Moreover, unless the discovery is merely incidental to the cause, as the interrogating part of the bill,[11] it must be remembered that the oath of the defendant to the answer cannot be waived; for the waiver is authorized "when a bill is for any other purpose than discovery only."[12]

§ 668. Bills for discovery and relief.—If the bill is for any other purpose than discovery only, that is, if any relief be asked, even though the relief be merely that the action at law on account of which the discovery is sought be enjoined, a stronger averment is necessary, and that is that the discovery is not merely material, but that it is indispensable to the plaintiff.[13] And the reason is plain; the bill seeks to oust the law court of jurisdiction; and that cannot be done upon the whim of the plaintiff. If he can prove his case at law, he must do so without transferring it into chancery.

But the bill will be sufficient if it avers that the plaintiff has no other means of knowing the facts, than by the discovery; and the want of averments sufficiently positive may be healed by amendment to the bill.[14]

§ 669. Creditors' bills of discovery.—The discussion of the statutory creditors' bills for discovery is foreign to this work,

[7] Dickinson v. Lewis, 34 Ala. 638. An earlier case held that it must aver that equitable aid was necessary; but this was too broad. Lucas v. The Bank of Darien, 2 Stewart, 280, 292.

[8] Continental Life Insurance Co. v. Webb, 54 Ala. 688, 697.

[9] Lucas v. The Bank of Darien, 2 Stewart 280.

[10] Horton v. Moseley, 17 Ala. 794; Continental Life Insurance Co. v. Webb, 54 Ala. 688.

[11] Russell v. Garrett, 75 Ala. 348.

[12] Sec. 3096, Code of 1907.

[13] Crothers v. Lee, 29 Ala. 337; Continental Life Insurance Co. v. Webb, 54 Ala. 688; Shackelford v. Bankhead, 72 Ala. 476; Lawson v. Warren, 89 Ala. 584.

[14] Shackelford v. Bankhead, 72 Ala. 476.

except to point out their history as probably having branched out from the old bills for discovery, although preserving little of their nature. From the standpoint of the parties who can maintain them they have already been treated in the chapters upon parties to suits in equity.[15]

It is apparent that the inspiration for them was the earlier right to maintain suits for discovery and relief, combined with the recognized equity, apart from statutes, for creditors with judgments upon which execution had been returned unsatisfied, to maintain bills to reach personal or equitable assets of the debtors and apply them to the satisfaction of the judgments although out of the reach of legal execution.[16] The first laws upon the subject authorized bills for discovery by judgment creditors whose judgments were not satisfied by execution, to reach trust property held by the defendant upon trusts created by him, and also where the defendant was charged with confessing other judgments fraudulently.[17]

With these sections was associated in the Code of 1876, a section authorizing creditors without a lien to attack alleged fraudulent conveyances;[18] and to that latter section has since been added the right for such creditors to file bills to discover as well as to subject property fraudulently conveyed.[19]

And other sections have given the right to file blanket bills of discovery to creditors having judgments at law upon which execution has been returned "no property found," as well as to creditors without such liens or judgments; and have authorized both kinds of creditors to join their suits in the same bill.[20]

It is held that for the maintenance of such bills, it is sufficient to aver that the defendants are indebted to the plaintiffs in certain various amounts; that the defendants have no visible means subject to legal process of value sufficient to

[15] See Chapters III, IV, V, VI, ante.

[16] Brown v. Bates, 10 Ala. 432; Roper v. McCook. 7 Ala. 318; Morgan v. Crabb, 3 Porter, 470. And see Brown v. Bates, 10 Ala. 432.

[17] Code of 1852, §§ 2987-2990; now §§ 3735-3738, Code of 1907.

[18] Zelnicker v. Brigham, 74 Ala. 598.

[19] Sec. 3739, Code of 1907.

[20] Secs. 3740, 3741, Code of 1907.

pay the plaintiffs' claims; that the defendants have no property standing in their own names which can be reached or subjected to legal process; but that they have property or choses in action which should be subjected to the plaintiffs' claims, although the kind of property and how it is concealed is unknown to the plaintiffs; and that a bill of discovery is necessary in order to find and reach it.[21]

[21] Kinney v. Reeves, 142 Ala. 604. This seems to be the last case; but of course the decisions are very numerous upon each stage and modification of the law in the several Codes.

CHAPTER XXXV.

Statutory Bills.

§ 670. Instances of statutory jurisdiction.—In addition to the chancery jurisdiction bestowed in imitation of the jurisdiction of courts of chancery in England, and in addition to the jurisdiction accorded with it which belonged to the personal jurisdiction of the chancellors in England, notably that over lunatics, certain special jurisdictions have been given to courts of chancery in Alabama by statute which are held to be original and peculiar, and not in extension of any phase of jurisdiction possessed by them before. At present these exclusively statutory jurisdictions of Alabama chancery courts are limited to proceedings of two kinds only, namely, proceedings to relieve infants of the disabilities of non-age,[1] and proceedings or suits to quiet the title and determine claims to land.[2] These two instances of special jurisdiction are alike only in that they are both held to be strictly statutory and limited;[3] but for that reason they may be here classed together, because they are both outside the scope of the general rules of chancery procedure.

§ 671. Proceedings to relieve infants of the disabilities of non-age.—The statutory proceeding to relieve an infant of the disabilities of non-age is hardly to be considered a chancery suit. It is rather an appeal to the discretion and statutory prerogative of the chancellor, similar to the new jurisdiction

[1] Secs. 4505-4511, Code of 1907.

[2] Secs. 5443-5449, Code of 1907. Before the enactment of the present laws giving married women the same rights as single women, there existed another special statutory jurisdiction of chancery courts in Alabama, the power to relieve married women of the diabilities of coverture in handling their separate estates. See Code of 1876, § 2731.

[3] Cox v. Johnson, 80 Ala. 22; Boykin v. Collins, 140 Ala. 407; Ashurst v. McKenzie, 92 Ala. 484; Cheney v. Nathan, 110 Ala. 254. In Adler v. Sullivan, 115 Ala. 582, the statute is called "an extension of the remedy in equity heretofore existing for the removal of clouds on titles; but it is treated in the opinion as a distinct statutory right. And see Weaver v. Eaton, 139 Ala. 247; Moore v. Ala. Nat. Bank, 139 Ala. 273.

conferred upon the chancery court over juvenile delinquents;[4] and as such is a subject of chancery jurisdiction rather than of chancery procedure. But special procedure is provided for the proceeding, and that must be briefly referred to here.

The jurisdiction of the chancellor to relieve an infant of the disabilities of non-age is invoked by a petition in writing presented either in term time or in vacation; and it may be presented by the father of the infant; or if the father is dead by the mother; or if the father and mother are dead, by the infant himself. And if the infant who is without father or mother has a guardian, the guardian must join in the petition.[5]

And it seems that an infant who resides in fact in Alabama, although having living parents who are non-residents of Alabama, may file the petition as if his parents were dead.[6]

The petition must be filed in the chancery district where the parent or guardian resides if filed by one of them, and in the district where the minor resides when filed by the minor alone.[7]

If the petition be filed by a parent who is the guardian of the minor, or by the minor and his guardian, the register should publish notice of the proceeding once a week for three weeks, before the petition is heard; and if the petition is filed by the parent alone, a copy must be served by the sheriff on the minor himself. And at the hearing any person may appear and upon giving security for costs, contest the wisdom of granting the petition.[8] But all these steps are held to be directions merely; so that if the chancellor grants the petition without their being observed, the decree is not invalid for the omission.[9]

§ 672. Filing the petition gives jurisdiction.—The petition places the infant in the arms of the chancery court and the omission of the formal averments cannot affect the chancellor's power to award the decree, when he is satisfied that it is to the

[4] Sec. 6450, et seq., Code of 1907.

[5] Sec. 4505, Code of 1907; Cox v. Johnson, 80 Ala. 22.

[6] Sec. 4506, Code of 1907.

[7] Ibid.

[8] Secs. 4507, 4508, Code of 1907.

[9] Boykin v. Collins, 140 Ala. 407. The nature of evidence to be furnished is specified by the chancellor for each case. Sec. 4508, Code of 1907. And the sufficiency of the evidence is not subject to review. Pollard v. Am. Freehold Land Mtge. Co., 103 Ala. 289, 296.

interest of the minor to relieve him.[10] If the infant is over eighteen years old, the age necessary for the jurisdiction to attach,[11] and the petition is properly filed, and is granted, the decree can neither be attacked collaterally by a stranger nor by the infant himself.[12] And when relied upon by innocent third persons, it cannot even be attacked for fraud.[13]

§ 673. Scope of decree.—The decree rendered by the chancellor upon the petition empowers the minor "to sue and be sued, contract, buy, sell, and convey real estate" and generally do whatever he could do if twenty-one years of age; but the court may restrict the minor's power to give certain acquittances, which must be set forth in the decree;[14] and a certified copy of the decree must be recorded in the office of the probate judge of each county in which the minor proposes to transact business.[15]

§ 674. Bills to quiet title.—A bill to quiet title to lands "and to clear up all doubts or disputes concerning the same," may be filed by any person in "peaceable possession" of them, whether actual or constructive,[16] against any person who "claims or is reputed to claim some right, title, or interest in or incumbrance upon" them;[17] and need allege only the plaintiff's possession and ownership, and that the defendant claims or reputed to claim them,[18] and that there is no suit

[10] Pollard v. Am. Freehold Land Mtge. Co., 103 Ala. 289; Boykin v. Collins, 140 Ala. 407. And compare Rivers v. Durr, 46 Ala. 418.

[11] Sec. 4505, Code of 1907.

[12] See cases in note (10). But the petition must be filed by the proper person, or the jurisdiction is not invoked. Cox v. Johnson, 80 Ala. 22.

[13] Per Chief Justice Marshall in Sims v. Slacum, 3 Cranch, at 307, "The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and therefore all acts performed under them are valid so far as respects third persons."

[14] Sec. 4510, Code of 1907.

[15] Sec. 4511, Code of 1907.

[16] Sec. 5443, Code of 1907; Brand v. U. S. Car Co., 128 Ala. 579. The possession may be of the minerals in the land only; and the bill may be filed to remove a cloud from the title to that interest. Gulf Coal & Coke Co. v. Alabama Coal & Coke Company, 145 Ala. 233. A new section of the Code of 1907, § 5449, authorizes the State to sue without the same restrictions.

[17] Sec. 5444, Code of 1907.

[18] Weaver v. Eaton, 139 Ala. 247.

pending which will suffice to test the claim;[19] and it calls upon the defendant to set forth his claim and how it is derived.

§ 675. Bill may be combined with other equities. — The statutory proceeding is, however, a litigation between parties; and so it may be joined in a bill seeking other appropriate relief.[20] And a bill defective for failure to offer equity as a bill for equitable relief, when so joined with the statutory prayer, may be good as a statutory bill without that offer.[21]

§ 676. Answer may be cross-bill.—As the statute requires that the bill call upon the defendant to set out his claim to the lands in question;[22] if that is set out, and is good, it may be decreed to be so without a cross-bill;[23] but from the nature of the request affirmative relief to the defendant is frequently appropriate; and so it is held that such relief may be given the defendant when he makes his answer a cross-bill.[24]

§ 677. Procedure after answer.—Upon the application of either party, a jury may be had to determine the issues, or any specified fact, and the court is bound by the result; but it may for sufficient reasons, order a new trial. But unless a jury is requested, the court determines the title and decrees accordingly.[25]

If the defendant instead of contesting the claim of the plaintiff, suffers a decree pro confesso, or disclaims as in the ordinary suit in equity, in such event he shall not be liable for costs. But the court shall decree the title to the land in the plaintiff. And if the defendant disclaims under oath, he may have his costs decreed to him.[26]

[19] Moore v. Ala. Nat. Bank, 139 Ala. 273; Parker v. Boutwell, 119 Ala. 297.

[20] Sloss-Sheffield &c. Co. v. Bd. of Trustees of Univ. of Ala., 130 Ala. 403; Bledsoe v. Price, 132 Ala. 621; Smith v. Gordon, 136 Ala. 495.

[21] Sloss-Sheffield &c., Co. v. Bd. of Trustees of Univ. of Ala., 130 Ala. 403.

[22] Meyer v. Calera Land Co., 133 Ala. 554.

[23] Interstate &c., Co. v. Stocks, 124 Ala. 109; Meyer v. Calera Land Co., 133 Ala. 554.

[24] Jenkins v. Jonas Schwab Co., 138 Ala. 664; Cheney v. Nathan, 110 Ala. 254.

[25] Sec. 5446, Code of 1907.

[26] Sec. 5448, Code of 1907.

CHAPTER XXXVI.

Petitions.

§ 678. Definition, and use.—A work on chancery practice would be deficient without some formal recognition of the growing practice of resorting to petitions in causes to obtain the determination by the court of collateral matters arising after the institution of the suit. The increased use of petitions under our practice is probably due in part to the extension of the jurisdiction of the court of chancery over funds of solvent and insolvent estates, and over assets of debtors under attachment statutes, the analogy of such jurisdictions to the federal jurisdiction in bankruptcy being conducive to the extensive use of petitions. But a notable extension of their use is the result of the application to chancery of statutory proceedings intended as special measures to be used in the probate court.

In its original use "a petition, ordinarily, is a proper proceeding by a party to a pending suit for some order or direction therein, touching the matter in controversy, or preliminary to the preparation of the cause."[1] Such is a petition for instructions by a receiver or a trustee when the trust is in court;[2] and a petition to appoint a guardian or administrator, and for maintenance to be allowed.[3]

§ 679. Sometimes doubtful whether petition or bill proper.—But with the original use of petitions as a basis, their legitimate scope became widened until it is often doubtful whether

[1] Per Clopton, J., in Renfro v. Goetter, 78 Ala. 311. And compare 3 Daniell Ch. Pr. 1801.

[2] Am. Pig Iron Storage Co. v. German, 126 Ala. 194; Foscue v. Lyon, 55 Ala. 440. These decisions were upon other petitions, but they each show that the records contained several ordinary petitions.

[3] 3 Daniell Ch. Pr. 1802. All these ordinary petitions have been some times called "cause petitions" to distinguish them from petitions by persons not already in the cause, which are described further on in this chapter. The uses of cause petitions in modern chancery pleading are not materially different from the English chancery. For a modern general discussion of the subject, see Van Zile on Equity Pleading, § 289, et seq.

the relief required should be sought by petition or by original bill or cross-bill. In Foscue v. Lyon[4] a trust was being administered in chancery, and after the statement of the trust accounts by the master, the trustee, who was a party defendant, filed a "supplemental cross-bill in the nature of a cross-bill of review" asking a lien for himself upon certain moneys shown by the account to be due one of his cestuis, and the court by Brickell, C. J., said:—"We incline to the opinion that the supplemental cross-bill was unnecessary, and that a petition was the proper mode of obtaining all the relief to which the appellee was entitled. It was said by Chancellor Kent, it is difficult 'to draw a precise line between cases in which a party may be relieved upon petition, and in which he must apply more formally by bill.' Whether relief shall be sought for by petition or bill when it grows out of matters involved in a pending suit, rests largely in the discretion of the court. * * * Applications for orders, partaking of the nature of decrees, or of decretal orders in a pending suit, are usually made by petition."

The court recognized the cross-bill as a petition, however; for our Supreme Court is very broad in dealing with pleading in accordance with its substance, disregarding the name applied to it by the pleader; and this treatment has been repeatedly applied to petitions.[5]

§ 680. Statutory petitions.—A further extension of the use of petitions has been made by statute in Alabama, the most notable example of which is the statutory petition by a defendant against whom a final decree has been taken upon a decree pro confesso without personal service. As we have seen, the defendant is given the privilege of coming into court at any time before the end of twelve months and filing a petition to set aside the final decree and retry the cause.[6] This statutory petition is not fundamentally different in its nature from the ordinary petition, the extension being in the creation of the right to the relief rather than the extension of the remedy. The statute keeps open the cause so as to make the

[4] 55 Ala. 440.

[5] Sayre v. Elyton Land Co., 73 Ala. 85; Ex parte Smith, 34 Ala. 455.

[6] See § 395, ante.

petition appropriate; but as in the cases of other petitions, if the statutory right is invoked, it is immaterial what the petition is called.[7] Although, of course, a proceeding in its nature directed to another end than opening up the decree, cannot be used as a statutory petition. The decree cannot be set aside, and the defendant let in to defend by filing a bill of review.[8]

Statutory petitions are not yet provided for chancery in many instances where the cause is already instituted. Besides the petition above discussed, there is now only the petition to declare the estate of a deceased person insolvent and continue its administration as such after it has been already taken into chancery upon other grounds. And even that proceeding is not now referred to in the Code as a chancery proceeding, the provisions reciting the proceedings directing the steps in the court of probate only.[9] But the first statute establishing the proceeding authorized its being taken in administration proceedings pending in either the probate court or the chancery court;[10] and the right to pursue it in chancery as well as in the probate court has ever since been recognized.[11]

Petitions to relieve infants of the disabilities of non-age, already fully discussed,[12] are hardly to be called petitions, since they are original proceedings, although ex parte, and are not parts of pending causes.

§ 681. Probate court petitions in chancery.—There is a large class of statutory petitions, however, which have been adopted into chancery procedure and recognized when filed in connection with pending administration causes, and which constitute far reaching extensions of the scope of petitions as modes of chancery procedure. For the probate court statutory proceedings were early provided in Alabama for the allotment of dower and the setting apart of homestead and other exemptions out of the property of decedents. These proceedings are purely statutory, and were provided of course

[7] Sayre v. Elyton Land Co., 73 Ala. 85.

[8] Winkleman v. White, 147 Ala. 481.

[9] Code of 1907, § 2756, et seq.

[10] Acts of Ala. 1878-9, 164.

[11] Clark v. Head, 75 Ala. 373; Henley v. Johnston, 134 Ala. 651.

[12] See § 670, et seq., ante.

as short methods for accomplishing the ends in view.[13] Therefore their adoption into chancery was an anomaly. But it was held that an administration proceeding was one entire cause throughout;[14] and as administration proceedings removed into chancery frequently involved such petitions already filed in the probate court which had to be removed, it is but a short step to recognize the appropriateness of such a petition filed later in the chancery court. No such petition seems as yet to have been taken to the Supreme Court, but it has doubtless been allowed as of course many times already.[15]

§ 682. Petitions of quasi-parties.—Another use for petitions in chancery causes is presented in the carrying out of decrees and orders of the court involving the interest of persons whose rights were not involved at the beginning of the suit. If a sale is decreed in chancery, and at the sale the property is purchased by an outsider to whom the execution of a deed is unduly delayed, the outsider has a right to petition the court in the premises. Not to allow the purchaser to protect himself by petition in the cause, would be unconscionable; and yet his standing is theoretically difficult to determine. In recognizing his right to file such a petition for the confirmation and carrying out of the sale, Brickell, C. J., said:— "From the day of purchase until the decree of confirmation the purchaser becomes a quasi-party to the cause in which the decree of sale was rendered, subject as such to the decrees and orders the court may render in reference to the sale, its vacation, or confirmation." He cannot file a new suit to assert his rights; but must present them by petition.[16]

§ 683. Intervening petitions by claimants of fund in court.— From recognizing the right of persons under such circumstances to appear in a cause, it is but a step to recognizing the right of every person interested in a fund in court, or claiming an interest in a fund in court in a cause in which

[13] They have already been described and their appropriation into chancery discussed. See § 659, et seq., anté.

[14] See § 660, ante.

[15] Compare Tygh v. Dolan, 95 Ala. 269.

[16] Haralson v. George's Excr., 56 Ala. 295.

he is not a party, to intervene by petition to have his interest protected or his claim established. His right to do this was first denied in Alabama,[17] but was later recognized, even to the extent of making himself a full party to the cause.[18] Subsequently this broad privilege was qualified, however, the court still recognizing the "general principle," "that intervention by petition may be allowed when the purpose of the petitioner is to assert his interest and right to share in a fund which is in the custody of, and being administered by the court,"[19] but refusing to allow the intervenor to become a full party, and refusing to allow him to intervene by petition when he has "a new and independent claim," and when he "desires for his own protection to present his new claim, to assert his independent rights, and raise new issues," because a plaintiff has the right to decide for himself with whom he will litigate.[20]

Under these limitations such claimants may prove and have their own claims allowed and may resist the claims of any similar claimants; and this is all they can demand by way of intervention in the pending suit.[21] These privileges of course do not preclude them from foregoing intervention in the pending suit, and instituting their own suit as they may see fit.[22] But it may be filed only by leave of the court, and will be regarded as independent or as an original bill in the nature of a cross-bill according as the court may determine.[23]

§ 684. Intervention by minority stockholders.—In addition to the above cases where funds are in court, minority stockholders probably have the right to intervene by petition or bill of the proper nature, when their interest is not being protected by the corporate authorities in suits affecting the corporate property. Their status is not exactly determined, since their right was recognized in a very recent opinion

[17] Cowles v. Andrews, 39 Ala. 125.

[18] Carlin v. Jones, 55 Ala 624.

[19] Per McClellan, J., in Ex parte Printup, 87 Ala. 148.

[20] Renfro v. Goetter, 78 Ala. 311; Louisville Mfg. Co. v. Brown, 101 Ala. 273; Talladega Co. v. Jenifer Iron Co., 102 Ala. 259; Ex parte Gray, 47 So. Rep. 286.

[21] Louisville Mfg. Co. v. Brown, 101 Ala. 273.

[22] Talladega Merc. Co. v. Jenifer Iron Co., 102 Ala. 259.

[23] Ibid. And compare language in Ex parte Gray, 47 So. Rep. 286.

affirming a refusal of the court to allow such an intervention on account of failure of proof.[24] But they probably occupy the position of cestuis who have a right under such circumstances to become full parties to the cause.

§ 685. Procedure upon petitions.—From the first simple petitions containing nothing not known to the parties and praying relief as of course, to the last elaborate petitions setting up many facts and praying special relief, a long advance is made which necessarily varies the procedure as to proof and hearing. The original simple petitions were usually submitted upon affidavits of their truth.[25] But the long special petition which "like an original bill, must contain within itself sufficient matter of fact to maintain the plaintiff's case,"[26] usually requires proof. It is customary, however, to establish it before the register on reference, and not before the court by depositions.[27]

Petitions may certainly be attacked by demurrer;[28] and they may be answered, of course; and error may be assigned in decrees upon them after final decrees.[29] And sometimes decrees upon them have been considered final decrees in themselves.[30]

But the entire procedure is somewhat tentative, because, as pointed out by the Supreme Court, so little guidance can be taken from other states; petitions—or at least intervening petitions—being so generally governed by statute.[31]

Simple petitions may be submitted any morning the court is in session.[32]

Costs entailed on petitions fall of course under the section of the Code authorizing the chancellor to impose or apportion all costs at his discretion, provided the matter proceeds to a decree.[33]

[24] Ex parte Gray, 47 So. Rep. 286, July 1908.

[25] See Ex parte Gray, 47 So. Rep. 286. And compare Van Zile Eq. Pl. § 292.

[26] German v. Browne, 137 Ala. 429, 436.

[27] Roy v. Roy, 48 So. Rep. 793.

[28] Buford v. Ward, 108 Ala. 307.

[29] Ibid.

[30] Roy v. Roy, 48 So. Rep. 793.

[31] Ex parte Gray, 47 So. Rep. 286.

[32] Chancery Rule 95, Code of 1907.

[33] Code of 1907 § 3222; Ex parte Robinson, 72 Ala. 389; Allen v. Lewis, 74 Ala. 379.

APPENDIX A.

Forms for Alabama Chancery Practice.

Contents of Forms.

A. Forms for the Bill.

1. Caption in the Chancery Court.
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5. Part I. The Address in courts having more than one judge.
6. Part II. The Introduction, by an adult.
7. Part II. The Introduction, by an infant.
8. Part III. The Stating Part, or premises.
9. Part IV. The Confederating Part.
10. Part V. The Charging Part.
11. Part VI. The Jurisdictional Clause.
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24. Affidavit for publication against resident who has been absent six months.
25. Affidavit for publication against resident who conceals himself.
26. Affidavit for appointing guardian ad litem.

27. **C. Form for Order of Publication.**

D. Forms for Steps Preparatory to Decree pro Confesso.

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30. Decree Pro Confesso upon service of process.
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N. B. For form for final decree upon a decree pro confesso, and for form for petition to fix bond necessary to execution of final decree upon decree pro confesso without personal service be-

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35. Demurrer for Multifariousness for different causes of action.
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44. Form for the Title.

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A. Forms for the Bill.

The Caption.

1. In The Chancery Court.

A. B. Plaintiff
v.
C. D. Defendant.

No.....
In the Chancery Court for.....
County, being the.....District of the
.....Chancery Division of Alabama.

2. In other courts having Chancery Jurisdiction.

A. B. Plaintiff
v.
C. D. Defendant.

No.....
In the.....Court of.....
in the County of..... State of
Alabama. In Chancery.

Parts of the Bill.

(Compare Chapter IX. ante.)

I. The Address.

3. In the Chancery Court.

Part I.

To the Honorable ....., Chancellor of the .....Chancery Division of Alabama:

4. In City Courts, Law and Equity courts, and Circuit Courts having jurisdiction of equity and law jointly, where there is but one judge:

To the Honorable.....Judge of City Court of ....., in Chancery sitting:

5. In courts having more than one judge:

Part I.

To the Honorable Judges of the City Court of..... in Chancery sitting.

II. The Introduction.

By an Adult.

6. Part II.

Your Orator (or Oratrix, if a woman), A. B., a resident of the County of..... in this State, and over twenty-one years old, respectfully exhibits this his Bill of Complaint against C. D., a resident (or a citizen, if he claims to "live" in the state but actually resides elsewhere) of the State of

Alabama, residing at..... in said state who is also over twenty-one years old (or a minor, or insane; in which case the guardian, if there is one, should also be joined; and it should be stated whether the infant is over or under fourteen years old).

By an Infant.

7. Part II.

Your Orator (or Oratrix, if a girl), A. B., a resident of the County of..... in the State of Alabama, and an infant suing by C. D. his next friend, who is a resident of the County of..... in this State (or suing by E. F., his general guardian, acting as such by authority of a decree of the Probate Court of..... County, in this State) exhibits this his Bill of Complaint against, &c., (continuing as in form 6.)

III. The Stating Part, or Premises.

8. Part III.

And humbly complaining your Orator would represent unto your Honor as follows:—(Here set out fully but concisely the story of the plaintiff's cause, giving facts but not evidence of facts, and dividing the matter into appropriate devisions or sections, numbered consecutively 1, 2, 3, &c. (See Chancery Rule 8, Code of 1907.)

The full English form of the stating part may be found in the footnote to section 27 of Story's Equity Pleading. Its formal closing led up to the Confederating Part.

IV. The Confederating Part.

This part should be omitted in Alabama unless a confederation is actually believed to exist, or unless there are other parties unknown at the time of the filing of the bill who are believed to have confederated with the named defendants, and whom it is hoped to find and join later; in which event the alleged confederation will be a premise to connect them with the case; as follows:—

9. Part IV.

And the said A. B. combining and confederating with (the said X. Y. if there are no other named defendants) and divers

persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, absolutely refuses to perform his duties to the plaintiff, which constitutes the grievance of this bill.

For the full form of the confederating part of the English bill see Story Eq. Pl. § 29, note.

V. The Charging Part.

10. Part V. (or IV. if the Confederating Part is omitted.)

And your Orator avers that the defendant cannot be heard to say (here set out anticipated pretended defenses known to the plaintiff); for on the other hand your Orator charges and states the fact to be, &c. (Here set out matters in rebuttal to the pretended defenses.) The anticipated defenses should be separately rebutted, each defense and rebuttal being numbered consecutively, 1, 2, 3, &c.

VI. The Jurisdictional Clause.

This part should be omitted; but if inserted to maintain formality, it should be very brief; as follows:—

11. Part VI. (or V. if the Confederating Part is omitted.)

And your Orator is advised that he is without remedy in a court of common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable.

For the full form of this part in the English bill see Story Eq. Pl. § 34, note.

VII. The Interrogating Part.

(This part may be omitted.)

12. Part VII. (or VI. if the Confederating Part is omitted.)

To the end, therefore, that the said defendants may show why your Orator should not have the relief hereby prayed, and may, upon their respective oaths (if oath is waived omit "upon their respective oaths") and according to the best and utmost of their knowledge, remembrance, information, and belief, respectively, full, true, direct, and perfect answer make to such of the statements, or to the several interrogatories

hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, * * * that is to say,

1. Whether, &c. 2. Whether, &c.

See Chancery Rule 13, Code of 1907.

For the full form of this part of the English Bill see Story Eq. Pl. § 35, note.

The Prayer for Relief.

13. Part VIII. (or VII. of the Confederating Part is omitted.)

And your Orator prays that Your Honor (Here set out the specific relief prayed, and then continue.) And if your Orator has not asked for the proper relief, your Orator further prays that he may have such further and other relief in the premises as the nature of his case shall require and as to your Honor may seem meet.

To which may be added when appropriate.

14. The Plaintiff's offer to do equity, as follows:—And the plaintiff submits himself to the jurisdiction of the Court, and offers to do whatever the court may consider necessary to be done on his part towards making the decree which he seeks just and equitable with regard to the other parties to the suit.

Compare George v. New England Mtge. Sec. Co., 109 Ala. 548, 550; Marx v. Clisby, 130 Ala. 502; 1 Daniell Ch. Pr., p. 441.

IX. The Prayer for Process.

15. Part IX.

And may it please your Honor to grant to your Orator the writ of summons of the State of Alabama to be directed to the said C. D. &c., (Here insert the names of all the defendants), thereby commanding them and every one of them personally to appear before your Honor in this Honorable Court within thirty days from the service thereof and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein as to this Honorable Court shall seem meet; and your Orator shall ever pray, &c.

See Story Eq. Pl. § 44, note.

N. B. When the bill is for discovery only, or to perpetuate the testimony of witnesses, the prayer should end with the

words "to answer all and singular the premises;" since no decree is asked. Story, ibid.

PRAYER FOR INJUNCTION.

When the issue of the writ of injunction is desired for temporary relief pending the cause, there should be added to the prayer for process the following:—

16. And may it further please your Honor to grant unto your Orator the writ of injunction of the State of Alabama to be directed to the said C. D. (Here set out the names of those to be temporarily injoined), restraining him from (Here set out what is to be restrained) until the further order of this Honorable Court; and your Orator shall ever pray, Etc.

PRAYER FOR PUBLICATION.

If the bill alleges that certain defendants are non-residents or unknown and publication is desired to bring them into court, the bill must be sworn to, and the following should be added to the prayer for process:—

17. And your Orator would further pray that Your Honor direct that the Register of this Court make out and superintend the appropriate order of publication to the non-resident or unknown defendants C. D. &c. (Here set them out by name, or if unknown, then by the interest they are supposed to have) commanding them within thirty days after the period specified in the order of publication to appear, &c., (as above).

FORM FOR THE FOOTNOTE.

18. The Defendant C. D. is hereby required to answer the allegations of Part III of the above bill from section 1 to section.....inclusive, and to answer the charges in Part V. of the above bill from section 1 to section.....inclusive, and to answer the interrogatories in Part VIII of the above bill from number 1 to number.... inclusive.

If oath to the answer is to be waived there should be added to the above, "but not under oath, oath to answer being expressly waived."

19. Form for allegations in bill or answer which can be made on information and belief only. "The plaintiff is informed and believes, and upon such information and belief charges the fact to be be," &c.

See Burgess v. Martin, 111 Ala. 656.

B. Forms for Affidavits.

20. Form for Affidavit to the Bill.

State of Alabama }
County of..... }

Before me..... Register in Chancery for the..... District of the..... Chancery Division of Alabama (or notary public, or other officer authorized to administer oaths) on the..... day of..... 19.... personally appeared ..... known to me, whose name is signed to the above Bill of Complaint, and being sworn by me he stated that he has read (or heard read) the above Bill of Complaint, subscribed by him, and knows the contents thereof, and that the same are true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he is informed and believes them to be true.

Subscribed and sworn to before me this..... day of ....., 19....

.....

Register, &c., or Notary Public.

See Burgess v. Martin, 111 Ala. 656. Cf. Puterbaugh's Ill. Ch. Pl., form 101.

N. B. A bill may be sworn to by an agent or attorney, but in that case the affidavit must set forth a sufficient reason why it is not verified by the plaintiff himself. See Chancery Rule 15, Code of 1907.

Affidavits for Publication.

If the bill does not allege that certain defendants are non-residents, but they are found to be such, no amendment of the bill is necessary, except of course to contradict a contrary averment in the bill. For the purposes of publication an affidavit of non-residence is sufficient.

21. Form of affidavit for publication against non-resident whose place of residence is known.

A. B.	}	No.....
v.	}	In the Chancery Court for.....
C. D.	}	County, Alabama.

State of Alabama }
County of.....}

Before me..... Register, &c., (giving proper title) on the..... day of..... 19.... personally appeared A. B. known to me, the plaintiff (or..... the agent of the plaintiff) in the aforesaid cause, and being sworn by me he stated that in his belief C. D., one of the above named defendants is a non-resident of this State, but as affiant believes, he now resides in (Here insert the place of residence, if known); and as affiant further believes, the said defendant is over twenty-one years of age (If a minor it should state whether he is over or under fourteen years of age).

(Signed) A. B.

Subscribed and sworn to before me this..... day of ....., 19....

.....

Register, &c., (give title).

See Chancery Rule 22, Code of 1907.

22. Form where defendant's residence is unknown.

(Give caption as above.)

..... and being sworn by me he stated that in his belief ..... one of the above named defendants is a non-resident of this State, but that he has made diligent inquiry to learn his place of residence, and has been unable to ascertain the same. (Age should be indicated as in form 21.)

(Signed) A. B.

Subscribed and sworn to before me this..... day of ....., 19....

.....

Register, &c., (give title).

See Chancery Rule 22, Code of 1907; and compare Puterbaugh's Ill. Ch. Pr., form 23.

23. Form where defendants' names are unknown.

(Caption and introduction as in Form 21.)

.....and being sworn by me he stated that the defendant who is described in section..... of Part..... of the Bill of Complaint in this cause, as having the interest

therein described in the subject matter of this suit, is unknown to the plaintiff, and that he has made diligent inquiry to ascertain the same, and that his residence as he believes is not in this State. (Signed) A. B.

Subscribed and sworn to before me this..... day of ....., 19....

.....

Register, &c.

See Section 3106, Code of 1907.

In such cases it is better, however, simply to swear to the whole bill.

24. Form were defendant is a resident, but has been absent from the State more than six months from the filing of the bill.

(Caption and introduction as in Form 21.)

.....and being sworn by me stated that the defendant ..... in the above cause resides in this State, but has been absent from this State more than six months from the filing of the bill of complaint in said cause; and that in the belief of the affiant said defendant is over twenty-one years of age (or an infant over or under fourteen years of age).

Subscribed, &c. (Signed) A. B.

See Chancery Rule 22, Code of 1907.

25. Form where a defendant is a resident but conceals himself.

(Caption and introduction as above.)

.....and being sworn by me stated that the defendant ....., in the above cause is a resident of this State, but that in affiant's belief he conceals himself so that process cannot be served upon him, and further that in affiant's belief said..... is over twenty-one years of age.

Subscribed, &c. (Signed) A. B.

See Chancery Rule 22, Code of 1907.

26. Form of Affidavit for appointment of Guardian ad Litem.

(Caption and introduction as above.)

..... and being sworn by me stated that the above named defendant..... is an infant, and said infant is believed to be over (or under as the case may be) fourteen

years of age, and said infant is believed not to have a general guardian in this State. (Signed) A. B.

Subscribed, &c., (as in Form 21.)

See Chancery Rule 23, and also sec. 4482, Code of 1907.

C.

27. Form for Order of Publication, copy of which should be published as notice.

A. B. Plaintiff v. C. D. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

ORDER OF PUBLICATION.

It being made to appear in the above cause from the affidavit of the plaintiff (or from the affidavit of....., the agent of the plaintiff, or from the sworn bill of complaint) that..... a defendant to the bill of complaint in said cause is a non-resident of this State and is believed by affiant to reside at..... in the State of..... (or that in the belief of affiant his residence is unknown; or that said defendant is a resident but in the belief of affiant he has been absent from the State more than six months from the filing of the bill, or that he conceals himself so that process cannot be served upon him;) and further that in the belief of said affiant said defendant is over twenty-one years of age (or that he is under twenty-one years of age,) or that his age is unknown to the affiant; it is now ordered, adjudged and decreed that said defendant (give name of defendant) appear in this Court and answer or demur to the bill of complaint in this cause before the..... day of....., 19...., (date should be not less than 30 days nor more than 50 days from the date of the order,) lest on his having failed so to do at the expiration of 30 days from said date a decree pro confesso be taken against him; and it is further ordered, adjudged and decreed that the Register of this Court have this order published with as little delay as may be in the (insert name of newspaper) a newspaper published at..... in this County once a week for four consecutive weeks; and further that

within twenty days from the making of this order, he post a copy of this order at the door of the Court House of this County, (or other place where the Court sits), and send another copy hereof to the said defendant..... to his address as aforesaid.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor, or Register, according to who makes the order.

D. Forms for Steps Preparatory to Decree pro Confesso.

28. Form for Certificate of Publication against non-residents.

A. B. Plaintiff v. C. D. et als., Defendants.	No..... In the Chancery Court for..... County, Alabama.

I, ... Register in Chancery for the..... District of..... Division, for..... County, of the State of Alabama, hereby certify that on the affidavit of..... on the..... day of....., 19...., an Order of Publication was made to the following parties, who are non-residents, and who reside at the several places set opposite their names, respectively, that is to say:

(Here insert names of defendants both adults and minors and their ages, indicating whether the infants are over or under fourteen years old), and was published in the....., a newspaper published in..... Alabama, once a week for four consecutive weeks, commencing.....19...., requiring the said parties hereinbefore mentioned to answer or demur to the bill of complaint in this cause by the..... day of....., 19.... lest in thirty days thereafter a Decree Pro Confesso be taken against any of them against whom a decree pro confesso may be legally taken. And that a copy of said order was forwarded by mail on the..... day of....., 19...., addressed to each one of said parties at the several places hereinbefore set after their names respectively, and that one copy of said order was posted on

....., 19...., at the Court House door of said County for four consecutive weeks.

.....

Register in Chancery.

29. Form for affidavit of identity of officer or agent of corporation served.

A. B. Plaintiff
v.
The X. Company
a corporation,
Defendant.

No.....
In the Chancery Court for.....
County, Alabama.

State of Alabama
County of.....

On the..... day of....., 19...., before me, ...Register in Chancery for the.....District of the .....Chancery Division, of the State of Alabama, consisting of the County of....., personally appeared..... known to me, who being sworn by me stated that.....upon whom process was served (as shown by the return thereof) as President (or other officer named in return of process) of (name of corporation) a corporation, defendant in the aforesaid cause, is in truth and in fact such officer of said corporation.

Witness the hand of the said..... signing and making oath before me on the..... day of....., 19...., as aforesaid.

.....

Register in Chancery.

N. B. Where the officers are unknown, absent from, or reside out of the State, or where the Corporation is foreign, and service is had upon an employee, as provided by Chancery Rule 21, Code of 1907, the affidavit should so state.

E. Forms for Decree pro Confesso.

30. Form for decree pro confesso upon service of process.

A. B. Plaintiff
v.
C. D. Defendant

No.....
In the Chancery Court for.....
County, Alabama.

DECREE PRO CONFESSO.

This cause coming on this day to be heard upon the Bill of Complaint in this cause filed, and it appearing to the Court that a summons was duly issued in this cause against the defendant A. B. (or defendants, naming them) requiring him to appear and demur, plead to, or answer the said Bill of Complaint within thirty days after service; and it appearing to the Court from the return of the sheriff upon said summons, that the same was served upon the said defendant on the ..... day of....., 19....; and it appearing further to the Court that thirty days have expired since said service of summons upon the said defendant and that he has failed up to this time to appear and demur, plead, or answer to said Bill of Complaint; Now therefore it is ordered, adjudged and decreed that the said Bill of Complaint be and the same is hereby taken as confessed against him; that is to say, it is taken as confessed that (Here insert the substance of the allegations taken as confessed) together with all other allegations of the said Bill of Complaint.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor, or Register, according to who makes the order.

31. Form for a decree pro confesso upon publication without personal service.

(Caption as above.)

DECREE PRO CONFESSO.

This cause coming on this day to be heard upon the Bill of Complaint in this cause filed, and it appearing to the Court from the affidavit of the plaintiff ..... (or from the affidavit of..... as agent of the plaintiff,) that the defendant ..... is a non-resident of this State, and is in the belief of affiant over twenty-one years old, and that his place of residence is stated in said affidavit, (or whatever other data are stated in the affidavit or sworn bill as to any defendant over twenty-one years old, to whom publication was had), and that an order of publication against him was made on the ..... day of....., 19....; and it further

appearing from the Certificate of Publication of the Register of this Court, dated the ..... day of ..... 19...., that said order of publication was published in the .....(Give name of newspaper.....) a newspaper published in ..... in this County, once a week for four consecutive weeks, to wit on the..... and ..... days of..... respectively; and it further appearing from said certificate that within twenty days from the date of said order a copy thereof was posted at the door of the Court House of this County, and another copy thereof was mailed to said defendant at the address of his residence (if any was given) given in said affidavit (or sworn bill), all of which is in full compliance with said order, and the provisions of law; and it further appearing to the Court that thirty days have expired, &c., (continuing as in form No. 30).

F. Forms for Defenses to the Bill to Avoid Answer.

32. Form for a Disclaimer.

(Caption as above.)

The Disclaimer of C. D. one of the defendants to the Bill of Complaint of A. B.

This defendant, saving and reserving to himself now and at all times hereafter all manner of advantage and benefit of exceptions and otherwise that may be had and taken to the many untruths, uncertainties, and imperfections in the said Bill of Complaint contained, for answer thereunto or unto so much or such part thereof as is material for this defendant to make answer unto, he answers and says that he does not know that he, this defendant, to his knowledge and belief, ever had, nor did he claim, or pretend to have, nor does he now claim, any right, title, or interest of, in, or to the estates and premises, situate, &c., in the plaintiff's bill set forth, or any part thereof; and this defendant does disclaim all right, title, and interest to the said estate and premises in, &c., in the plaintiff's bill mentioned, and every part thereof. (From this point the ending of an answer is used, followed by oath, unless waived in the bill).

See Story Eq. Pl. § 844, note.

Forms for Demurrers.

33. Form for all demurrers.

(Caption as above.)

Demurrer of Defendant C. D. to Bill of Complaint of A. B.

And now comes the defendant C. D. and demurs to the Bill of Complaint in this cause filed and for cause of demurrer shows that, &c.,(Here set forth the several causes of demurrer). Wherefore this defendant demurs to said Bill, and to all matters and things therein contained, and prays the judgment of this honorable Court whether he shall be compelled to make any further or other answer thereto, and prays to be dismissed with his reasonable costs in this behalf sustained.

.....

Solicitor for Defendant.

See Puterbaugh's Illinois Ch. Pr., p. 94. For the long form of a demurrer see Story Eq. Pl., § 455, note.

34. Form for general demurrer for want of equity.

Use form 33, inserting as ground for demurrer the following:

That the plaintiff has not in his bill stated such a case as entitles him in a court of equity to any discovery or relief from this defendant touching the matters in the said bill. Wherefore, &c.

See Puterbaugh's Illinois Ch. Pr.

It is customary in Alabama however merely to assign that the bill is without equity.

35. Demurrer for multifariousness for joining different causes.

Use form 33, inserting ground of demurrer as follows:

That it appears by the said bill that the same improperly unites distinct matters and causes, so that the bill is altogether multifarious.

36. Demurrer for multifariousness for joining plaintiffs having different causes.

Use form 33, inserting as ground:

That it appearing from the said bill that the same is exhibited against this defendant by plaintiffs having distinct

matters and causes to such an extent that the bill is altogether multifarious.

37. Demurrer for multifariousness for joining defendants improperly.

Use form 33, and insert as ground:

That it appears by the said bill that the same is exhibited against this defendant and the several other defendants for distinct matters and causes, in several whereof this defendant is not in any manner concerned, and that the bill is altogether multifarious.

Probably a demurrer assigning merely that the bill is multifarious would not be overruled for form; but the plaintiff should be more fully informed of the defect than by that assignment.

38. Demurrer for want of parties.

Use form 33, and insert as ground as follows:

That it appears by the said bill that G. H., therein named, is a necessary party to said bill, inasmuch as it is therein stated (Here show why G. H. is a necessary party); but the plaintiff has not made the said G. H. a party to said bill.

39. Demurrer to part of the bill.

Demurrer of C. D. to the Bill of Complaint of A. B.

And now comes the defendant C. D. and demurs to so much of said bill as sets forth (Here insert the matter demurred to) and to the relief sought thereon, and for cause of demurrer shows, (Here set out ground.) Wherefore as to so much of the bill of complaint as is before set forth this defendant demurs, and prays the judgment of this honorable court whether he shall be compelled to answer such parts of the said bill as aforesaid.

.....

Solicitor for Defendant.

Much of the above forms for demurrers are taken from Puterbaugh's Ill. Ch. Pr.

Forms for Pleas.

40. General form of a plea to the whole bill.

(Caption as in form 30 above.)

Plea of C. D. to the Bill of Complaint of A. B.

And now comes the defendant C. D. and by protestation not confessing any of the matters in the plaintiff's bill to be true in such manner and form as the same are therein set forth, does plead thereto and for plea says that

(Here set forth the subject matter of the plea)

all of which matters this defendant avers to be true, and pleads the same to the whole bill, and demands the judgment of this honorable Court whether he ought to be compelled to make any answer to the said bill of complaint; and prays to be hence dismissed with his reasonable costs in this behalf sustained.

.....

Solicitor for Defendant.

This is taken from Puterbaugh's Ill. Ch. Pr.

N. B. If the plea is to part of the bill only the beginning and ending should so point out, as form 39 points out when a demurrer is to part of the bill only.

41. Form for a plea of the infancy of plaintiff.

Use form 40, and for ground insert:

That the plaintiff before and at the time of filing his said bill, in which he appears as sole plaintiff, was and now is under the age of twenty-one years and is an infant.

42. Form for a plea of the statute of limitations.

Use form 40, and for ground insert:

That if the plaintiff ever had a cause of action against this defendant for any of the matters in the said bill mentioned, which this defendant does not admit, the same was for (here allege the nature of the claim if it does not appear in the bill) and arose above..... years (here insert the limitation to suits on such claims) before the filing of the bill of complaint in this cause; and this defendant avers that he has not at any time within the said..... years ever promised to come to any account with, or pay to, or in any way satisfy the

plaintiff for any of the claims or matters charged in the said bill.

See Puterbaugh's Ill. Ch. Pr., p. 108. And compare Battle v. Reid, 68 Ala. 149.

43. Form for a plea of purchase for value without notice—An Anomalous Plea.

See McKee v. West, 141 Ala. 531.

Use form 40, and for ground insert as follows:

That on the..... day of....., 19...., the defendant A was in the actual or constructive possession of the lands described in the bill and was seized, or claimed to be seized, in the transactions with this defendant, with the legal title to said lands; that on said date he made a loan of money to the said A, and that contemporaneously therewith he took from him a mortgage to secure the repayment of said sum of money and the interest thereon; that before making said loan he required an examination of the records in the office of the Judge of Probate of..... county by an attorney, who reported that the title to said lands was in the said A; that relying on these facts he made the loan and took the mortgage to secure the same; that at the time he made such loan and took said mortgage, he had no notice of the complainant's equity and knew of no facts calculated to put him on the enquiry, either at or before the time he parted with the money loaned or at or before the time he took the mortgage on the said lands, to secure said loan.

G. Forms for the Answer.

Part I. The Title.

44. 1. Form for the Title.

A. B. Plaintiff v. C. D. Defendant.	No..... In the Chancery Court for..... County, Alabama.

Answer of C. D. Defendant to the Bill of Complaint of A. B. If more than one defendant answers together, it should be, "The joint and several answers of," &c.; and if the answers are separate it should be,

The answer of C. D. one of the defendants, &c.

PART II. THE COMMENCEMENT.

45. Form for the commencement of the answer.

This defendant reserving to himself all right of exception to the said bill of complaint, for answer thereto, says,*

PART III. THE ANSWERING PART.

Forms in the body of the Answering Part.

The answering part is usually divided into sections numbered corresponding to the stating part of the bill answered.

46. Where defendant admits a statement. *

And this defendant further answering, says that he has been informed and believes it to be true, that, &c.

47. Where defendant admits a writing. *

And this defendant further says that he has been informed and believes it to be true, that, &c.; but for greater certainty therein craves leave to refer to said, &c., when the same shall be produced.

48. Where defendant is entirely ignorant with regard to the statement in bill. *

And this defendant further answering says, it may be true, for anything this defendant knows to the contrary that, &c., but this defendant is an utter stranger to all and every such matters and cannot form any belief concerning the same. *

PART IV. THE DEFENSES.

49. Form for the defenses.

And this defendant offers and sets forth the following defenses to the matters, claims, and equities, if such they be, set forth in the bill of complaint; that is to say:

(1) (Here set out fully all the facts constituting the first affirmative defense.)

(2) (Here set out the second defense;) and so on with all the defenses to be offered.

*See Puterbaugh, Ill. Ch. Pr.

Part V. The Ending of the Answer.

50. Form for the ending.

And this defendant denies all combination and confederacy, wherewith he is by the said bill charged, without this, that any other matter in the said bill of complaint contained necessary for this defendant to make answer unto and not herein well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all which matters this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

See Story Eq. Pl. § 871.

N. B. For oath to the answer see the form for the oath to the bill.

51. Form for an Answer to be taken as a Cross-bill under section 3118 of Code of 1907.

After the defenses insert as follows:

V. And this defendant is entitled to relief against certain of his co-defendants in this cause, that is to say, (Here insert names of the Co-defendants against whom he seeks relief;) And to that end would further show (Here set out matter upon which the claim to relief is based, numbering appropriate divisions, and then continue;) Wherefore this defendant prays that, &c., (setting out the relief sought, and ending with a prayer for general relief.)

The cross-bill, being part of the answer should end with the ending of the Answer, Form 50, above; from which should be omitted, however, words "to be hence dismissed with."

When the cross relief desired is against the plaintiff, it is unlikely that there will be affirmative defenses, and the cross-bill will take the place of Part IV. and should begin, "and this defendant is entitled to affirmative relief against the plaintiff; and to that end would have this his answer taken as a cross-bill and would further show," &c., continuing as above.

After the cross prayer should be inserted a prayer for the issue of process when the cross-bill is against a co-defendant.

52. Form for amendment to a bill or an answer when on separate paper.

(Caption as above.)

And now comes the Plaintiff in this cause, A. B. (or the defendant, if an amendment to the answer), and by leave of the Court first prayed and obtained amends the bill of complaint in this cause filed as follows:

1. By inserting in section..... of Part..... of the Bill immediately after words ".....," the following ".....," &c.

N. B. The beginner should not attempt to amend a bill without reading Chapter XI. ante.

H. Forms as to Guardians and Administrators ad Litem.

53. Form for order appointing Guardian ad Litem for minor over fourteen, and guardian's consent to act.

A. B. Plaintiff v. C. D. et als., Defendants.	No..... In the Chancery Court for..... County, Alabama.

I, ... hereby consent to act as Guardian ad Litem in the above cause for the following named infant parties therein, whose residences and ages are set opposite their names that is to say: (Here insert names of infants).

Witness my hand this.....day of....., 19....

.....

Order of Court.

It appearing to the Court from the affidavit of ..... the Plaintiff in this cause (or from the affidavit of .....) that the following defendants in this cause are infants, that is to say: (Here insert names of infants), and that the said infants are believed to be over fourteen years of age;

And it further appearing from said affidavit that the said infants have no guardian acting under authority of the decree of any court within this state;

And it further appearing from the return of the Sheriff in this cause that thirty days have elapsed from the service of process upon said infants in the manner provided by law (or

since the filing of the certificate of publication by the Register, when publication was had);

And that said infants have not in the meanwhile made known any choice of a guardian ad litem;

And it further appearing that ..... a Solicitor of this Court, has filed his consent in writing to act as such Guardian ad Litem;

And the name of said.....not having been suggested to the Court by the plaintiff or his solicitor in this cause, and said..... not being in the knowledge of the chancellor related by blood or marriage within the fourth degree to the plaintiff or his solicitor or to the Chancellor or the Register, and said ..... being a fit and suitable person to act as such guardian ad litem; it is ordered, adjudged and decreed that the said ..... be and he is hereby appointed Guardian ad Litem for the infant defendants: (Here repeat the names of the infants.) to represent their interests in this cause.

Ordered, adjudged and decreed this..... day of....., 19....

.....

Chancellor.

N. B. Where the infant is under fourteen, the acceptance should so state, and the method of service should be recited; but the failure of the infant to choose his guardian ad litem should be omitted.

Form for appointing Guardian ad Litem for insane defendant is the same as that for appointing guardian ad litem for infant over fourteen.

54. Form for order appointing administrator ad Litem.

A. B. Plaintiff, v. C. D. et als., Defendants.	No..... In the Chancery Court for..... County, Alabama.

It appearing to the Court from the affidavit of ....., that ....., one of the Defendants in this cause, has died since the filing of the Bill of Complaint, and that his estate must be represented in this cause, and that there is no executor

or administrator thereof in this State, it is hereby ordered that ..... Esq., be and he hereby is appointed administrator ad Litem to represent said estate in this cause, and that he appear and represent the said estate in this cause before this Court.

Ordered, adjudged and decreed this..... day of....., 19....

.....

Chancellor.

I hereby accept the appointment of Administrator ad Litem of the Estate of....., deceased, to represent said estate in this cause this..... day of....., 19....

55. Form for answer of infants by their guardians ad litem. *

The answer of E. D. and C. D., infants, under the age of ..... years, by E. F., their guardian ad litem, to the bill of complaint of A. B.

These defendants answering by their guardian ad litem, say, that they are infants, this defendant E. D., of the age of ..... years, or thereabouts, and this defendant C. D., of the age of ..... years or thereabouts, and they therefore submit their rights and interests in the matter in question in this cause to the tender consideration and protection of this honorable court, and pray strict proof of the matters alleged in said bill of complaint.

I. Forms for Final Decrees.

56. Form for a Final Decree.

N. B. This decree is one upon a bill by an heir seeking to remove an administration into Chancery. It contains much more than the ordinary final decree, and may be adapted to any cause by striking out matters refering to such a cause only.

A. B. Plaintiff v. C. D. Admr. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

This cause coming on to be heard on the ..... day of .....19...., on the Bill of Complaint as last

*See Puterbaugh, Ill. Ch. Pr.

amended in this cause filed, and the answer as last amended and exhibits thereto of the Defendant C. D. as administrator of the estate of E. F., deceased, and the answer of the defendants J. F. and R. H. and also upon the answer of ..... as Guardian ad Litem of the infant defendants O. F., P. F. and Q. F., and the separate answer of the said....., as Guardian ad Litem of the defendant non-compos mentis, ... and the separate answer of the said ..... as Administrator ad Litem of the estate of the defendant ..... deceased, and also upon the decree pro confesso taken against the defendants X. Y. and Z., and also upon the testimony as noted by the Register; And all the said parties thereto (except those against whom decree pro confesso had been taken as aforesaid) being present in court in person or represented by counsel; and the court having heard arguments of counsel upon the matters at issue; and it appearing to the Court that the Plaintiff is a person interested in the estate of E. F., deceased, and as such has a right to have the administration of said estate of said E. F., deceased, removed into Chancery, and that the Defendant C. D. is sole administrator of said Estate of ....., deceased, appointed and acting under letters of Administration upon said estate issued by the Probate Court of this ..... County; and that as such administrator he has not begun proceedings in any Court for the final settlement of said estate, and that therefore the plaintiff's Bill seeking to have the said administration of the estate of E. F., deceased, removed into this Court, has equity; it is therefore ordered, adjudged and decreed, that the administration of the estate of said E. F., deceased, be and the same is hereby removed into this Court, and this Court hereby assumes jurisdiction thereof, and the defendant C. D. as administrator of the estate of E. F., deceased, is hereby directed to file in this court with all convenient speed a duly certified transcript of all letters of administration and all papers, petitions, inventories filed in the Probate Court of this County since the first granting of letters in said estate in said Probate Court, together with certified transcripts of all orders of said Probate Court in said administration, including as well

the said petitions of said J. F. for allotment to her of lands in lieu of homestead and her petition for allotment to her of dower by metes and bounds out of said estate of E. F., deceased, copies of which two petitions are made exhibits to her answer in this cause; And it further appearing to the Court from the ..... in said cause that the particular allegations of the bill are not proven which deny that Lot ..... in Block ..... in the City of ....., one of the pieces of property of the estate of said E. F., deceased, and being the piece out of which the said defendant ..... seeks for allotment to her of lands in lieu of homestead, can be divided so as to set apart to her therefrom such portion as is authorized by the laws of this State to be set apart as exempt in lieu of homestead, but that on the contrary such Lot ..... in Block ..... can be so divided; it is hereby further ordered, adjudged and decreed that said Lot..... in Block ..... in the City of ..... in said ..... County is capable of being divided so as to set apart to her out of it a parcel of land as exemption in lieu of homestead which will conform to the requirements of the laws of this State, and that upon the hearing by this Court of her said petition to that end, and the proof of all other necessary allegations therein not proven at this hearing, she shall be entitled to have her said petition granted. And it further appearing to the Court, from the testimony in said cause, that the particular allegations of the Bill of Complaint are not proven which deny that the estate of said E. F., deceased, is capable of being divided so as to set apart to the said defendant J. F., widow of said E. F., her dower by metes and bounds out of said estate as prayed for in her said petition, but that on the contrary the property of said estate as recited in the Bill of Complaint and the Answers is capable of being so divided, it is therefore further ordered, adjudged, and decreed that the real estate of the said E. F., deceased, as recited in the pleadings in this cause and in the copy of petition made exhibit to the answer of the defendant J. F. for allotment to her of dower, is capable of being divided so as to set apart therefrom by metes and bounds dower conformable to the laws of this State, and that upon the hearing by this Court of her said petition to that end,

and the proof of all other necessary allegations therein not proven at this hearing, she shall be entitled to have her said petition granted.

Ordered, adjudged and decreed this..... day of....., 19....

.....

Chancellor.

N. B. The above is for a final decree upon a bill by an heir seeking to transfer the administration of an estate into Chancery. Such a suit has many important points to be decided, and therefore presents an excellent example for study. As will be noted it may require several successive final decrees.

57. Form of Decree ordering allotment of dower by metes and bounds where the commissioners are chosen by the sheriff.

A. B. Plaintiff v. C. D. Admr. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

N. B. The necessary averments in a petition for allotment of dower by metes and bounds are indicated in the opinion in Martin v. Martin, 22 Ala. 86. And see as to averments of decree, Forrester v. Forrester, 39 Ala. 320.

This cause coming on this day again to be heard on the petition of J. F. for allotment to her by metes and bounds of dower out of the real estate in this County of the intestate E. F., deceased, and upon the report of the Register filed and read in open Court on the ..... day of ..... 19...., upon a reference ordered on the.....day of .....19...., directing the Register to take down in writing such testimony as the parties might offer and report the same to this Court in order to ascertain whether the allegations of said petition are true; and said report having laid over more than one day for exceptions and no exceptions having been taken thereto; and it appearing to the Court that all parties to the cause or their attorneys of record have had due notice of the hearing of said petition; and it further appearing that the allegations of the petition are proven which entitle the petitioner to dower in the lands of the intestate in this

County described in her said petition; that the petitioner the said J. F. is a resident of this County, and the widow of the said E. F., deceased, to whom she was married and whose wife she was at the time of his death; that the said decedent E. F. departed this life intestate on .....19...., and that he was seised in fee simple in his own right during his marriage with petitioner, said J. F., and at the time of his death, of the several parcels of real estate in this County in the petition described, and to which the petitioner never relinquished her right of dower, that is to say:

(Here insert description of real estate out of which dower is prayed).

And it further appearing and being proven to the Court, that dower in said lands can be fairly assigned by metes and bounds, and that said J. F. had, neither during the life time of her said deceased husband, nor now, any separate estate of her own; and that the said E. F. deceased, owned no residence in this County which he used as a home or homestead at the time of his death, and that the petitioner is not occupying any of his said property as a home or homestead now; and it being further proven that the living issue and heirs of the intestate are as alleged in her said petition; it is now ordered adjudged and decreed, that the said report of the Register is approved and that the petitioner the said J. F. is entitled to have an estate for her life set apart to her in one third (or one half if there is no living issue of the decedent) of all and singular the lands and property hereinbefore described; that the sheriff of this county be and he is hereby directed to summon five resident freeholders in this County, not connected with the parties by consanguinity or affinity as commissioners to allot and set off by metes and bounds the dower as aforesaid, having regard to the improvements and quality of the land as well as the quantity of the dower; and whereas the petitioner is also entitled by a decree of this Court this day rendered to an allotment of land in lieu of homestead claimed by her to be set apart out of one of the pieces of property aforesaid, it is further ordered that the said commissioners allow for said allotment in lieu of homestead prior to setting apart said dower interest under this decree.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor.

58. Form for a decree appointing commissioners in cases which do not require the commissioners to be selected by the Sheriff.

A. B. Plaintiff v. C. D. Admr. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

N. B. The form is one appointing Commissioners to set apart homestead, but is applicable to any partition proceeding.

Decree ordering allotment of Exemption in lieu of Homestead.

This cause coming on this day again to be heard on the petition of J. F. for allotment to her of exemption of land in lieu of homestead out of the real estate in this County of the intestate E. F., deceased, and upon the report of the Register filed and read in open Court on the.....day of .....19...., upon a reference ordered on the..... day of .....19...., directing the Register to take down in writing such testimony as the parties might offer and report the same to the Court in order to ascertain whether the allegations of said petition are true; and said report having laid over more than one day for exceptions and no exceptions having been taken thereto; and it appearing to the Court that all parties to the cause, or their attorneys of record, have had due notice of the hearing of said petition; and it further appearing that the allegations of the petition are proven which entitle the petitioner to an exemption of real estate in lieu of homestead in the lands of the intestate in this County described in her said petition, that the petitioner the said J. F. is a resident of this County, and the widow of the said E. F., deceased, to whom she was married and whose wife she was at the time of his death; that the said E. F. left no issue surviving him at the time of his death; (If the decedent left issue they should be joint beneficiaries of the exemption) that the said decedent E. F. departed this life intestate on .....

19...., and that he was seised in fee simple in his own right during his marriage with the petitioner said J. F., and at the time of his death, of the several parcels of real estate in this County in the petition described; and it being proven that the deceased E. F. at the time of his death, had no homestead exempt to him from levy and sale under process, and that the petitioner his widow has not obtained the benefit of such exemption under section 4189 of the Code of 1907; and it further being proven that Lot ..... in Block ..... a parcel among the pieces of property recited in the petition as the property of the intestate, and the particular parcel out of which the petitioner claims and seeks to have allotted to her said exemption in lieu of homestead, is as a whole worth much more than $2,000, but is capable of division so that there may be set off out of it a plat of ground with the improvements thereon and appurtenances not exceeding two thousand dollars ($2,000) in value; it is now ordered, adjudged and decreed that the said report of the Register stand approved, and that the petitioner, the said J. F. is entitled to have an estate for her life set apart to her as exemption in lieu of homestead to her in the lands and property of her said husband, E. F., deceased, and that the same can be set apart out of said Lot ..... in Block ..... in the City of ..... in said County; and O., P., and Q., are hereby appointed as commissioners to allot and set apart by metes and bounds said exemption as aforesaid; and the said commissioners are hereby instructed to do so, and within ten days thereafter to make a written report to this Court of the exemption set off and allotted by them.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor.

59. Form for a petition to fix the bond necessary for the execution of a final decree upon a bill taken pro confesso, when execution is had before the expiration of twelve months.

(Caption as in above forms.)

Comes your petitioner J. F. a defendant in the above cause and prays the Court to fix the amount of the bond that may be required under section 3176 of the Code of 1907 in order

to obtain confirmation of the report setting aside to her as widow of the intestate E. F., deceased, her dower by metes and bounds.

.....

Solicitor for Petitioner.

60. Form for Order fixing bond in accordance with said petition. The bond in this form is one for confirmation of a decree for dower when rendered upon decree pro confesso without personal service. Compare, however, the doubt expressed as to the necessity for the bond in Roy v. Roy, 48 So. Rep. 793.

(Caption as above.)

The petition of J. F. filed in said cause on the.....day of....., 19...., this day coming on to be heard, seeking to have the Court fix the bond to be furnished by her as otherwise described before the confirmation of the report of Commissioners setting apart to her dower filed in the Court on the.....day of....., 19....; And it appearing to the Court from the report of the Register made on the..... day of....., 19...., upon a reference held to ascertain the truth of the allegations in the petition for dower, that the property allotted by said commissioners as dower rents for $..... a year; it is now ordered, adjudged and decreed that a bond in the sum of $....., to be approved by the Register, conditioned as required by law, shall be furnished by the petitioner before the report setting aside dower shall be confirmed.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor.

61. Form for bond necessary to execution of a decree upon a bill taken pro confesso without personal service, if the execution is desired before the expiration of one year.

State of Alabama }
.....County }

Know all men by these presents:—

That We,.....as principal and.....as sureties are held and firmly bound unto.....as Register in Chancery of the.....District of the.....Chan-

cery Division of Alabama, in the sum of....., whereto we bind ourselves, our successors and personal representatives;

And the condition of this bond is such that if the decrees taken on the Bill pro confesso against

(Here insert names of defendants against whom decree pro confesso is taken.)

in the cause of A. B. v. C. D. et als., No..... in the Chancery Court for said District, shall be set aside within one year from this date, and we shall account for the value, rents, and profits of the following pieces of real estate in the County of..... and State of Alabama, to wit: (Here insert list of property referred to above.) all of which is fully described in the report, (&c.), and if we shall further abide by and perform such decree as the Court may render, this bond shall be void, otherwise shall remain of full force and effect.

In witness whereof the said..... has hereto set his hand and seal, and the said..... has hereto set its name and affixed its corporate seal this..... day of .....19....

.....(Seal)

.....(Seal)

62. Form for order of Register approving bond.

(Caption as above.)

This cause coming on this day before me upon the order of Court made the..... day of..... 19...., in this cause fixing the amount of the bond required to be executed by..... in order that execution of the final decree rendered in this cause on the..... day of..... 19...., may be had before twelve months from the date thereof; and the said..... having tendered to me this day his bond in the required sum, conditioned as required by law, with..... as sureties thereon, and the same appearing to me to be good and sufficient sureties, it is hereby ordered that the said bond be and the same is hereby approved this..... day of....., 19....

.....

Register, &c.

63. Form for a motion to confirm report of commissioners.

(Caption as above, giving name of case.)

And now comes the defendant, your petitioner for dower, and moves the Court to confirm the report of S. T. U. V. and W., filed in this cause on the..... day of....., 19...., setting apart to your petitioner her dower in the estate of E. F., deceased, by metes and bounds, as therein described.

.....

Solicitor for Defendant J. F.

(Here insert names of solicitors of other parties.)

You will take notice that the above motion has been filed in said cause, and that on.....19...., I will call said motion up for action by the Court thereon.

.....

Solicitor for Defendant J. F.

N. B. The above may be used as a form for any motion.

64. Form for a decree confirming a Report of Commissioners.

N. B. By changing the matter it may be adapted to a decree confirming any report of commissioners.

A. B. Plaintiff v. C. D. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

Decree Confirming report of Commissioners setting apart Dower by metes and bounds.

This cause coming on this day again to be heard on the report of S. T. U. V. and W., summoned by the Sheriff of this County under a decree of this Court in this cause rendered on the ..... day of....., 19...., directing that the sheriff of this County summon five residents freeholders of this County not connected with the parties by consanguinity or affinity as Commissioners to allot and set off to J. F., widow of E. F., deceased, her dower by metes and bounds out of the lands of said decedent, which report was filed on the ..... day of .....19....; and also coming

on to be heard on the motion of the said Defendant J. F. that the said report be confirmed; And it appearing to the Court that said report has lain over more than ..... days for exceptions and that the only exceptions taken thereto were taken by the plaintiff by paper filed in said cause on the .....day of.....19...., and that said exceptions have been subsequently by order of Court made on the .....day of.....19...., overruled; and it being shown to the Court that all parties to the record or their solicitors of record have had proper notice of the said motion for confirmation; and it further appearing to the Court that the said J. F. has filed her bond with sufficient surety for $....., payable to the Register of this Court conditioned as required by law to account for the value, rents, and profits of the real estate transferred by operation of said decrees and report, and further to abide and perform such decrees as the Court may render if the decrees taken on the original Bill as amended pro confesso in the cause shall be set aside, which bond has already been approved by the Register; it is now ordered, adjudged and decreed that the said report of the said S. T. U. V. and W., commissioners as aforesaid, filed on .....day of.....19...., be and the same is in all respects hereby confirmed; And that the said J. F. is vested with an estate in the County of ..... and State of Alabama, set aside to her and fully described in said report, as her dower out of the estate of her deceased husband the said E. F., deceased, the said lands being as follows:

(Here insert description of lands.)

Ordered, adjudged and decreed this..... day of....., 19....

.....

Chancellor.

J. Form for a Petition Requiring a Reference, as for Administrators Settlement.

N. B. This petition contains many things not generally required in petitions for other matters. It may be adopted by striking out what is inapplicable.

65. Form for an Administrator's petition for final (or partial) settlement.

(Caption as above, giving case and court.)

And now comes your petitioner ....., and offers his statement of his account as administrator of the estate of E. F., deceased, for final (or for a partial) settlement of his administration. And your petitioner would show unto your Honor as follows:

1. That the intestate E. F., deceased, died in this County intestate and without issue on.....19...., and your petitioner was granted letters of administration upon his estate by the Probate Court of this County on the ..... day of..... 19...., that the Plaintiff in this cause A. B., one of the heirs of the said intestate, filed in this County on the.....day of.....19...., his Original Bill seeking among other matters to have the administration of said estate transferred to this Court, and that this Court assumed jurisdiction of said administration by decree rendered in this cause on the.....day of.....19....

2. That shortly after his appointment as administrator as aforesaid, your petitioner filed in the Probate Court of this County his inventory of said estate (a certified copy of which is in the files in this Court) by which it appears that the personal assets of the deceased consisted of (Here recites briefly the nature of the personal assets).

3. That all the residue of said estate consisted of real estate in this County rented out to tenants in possession of the same upon terms ranging from one month to several years; that immediately upon receiving letters of administration as aforesaid your petitioner took possession of said real estate in his capacity of administrator, collected the rents then owing upon the same, and also the rents since then falling due under leases for the same; and he herewith submits a list of the leases now existent upon the respective properties with the names of the several tenants to whom the same were made.

4. And your petitioner would further show that all the debts of the said intestate proved in Court or presented to him for payment have been paid; and that he has also paid from time

to time the charges and expenses of maintaining said real estate, but only such as he believed necessary for the preservation thereof.

(The petition should then set out any other important questions coming upon the settlement, and then set out the list of heirs or next of kin, if known.)

Wherefore, for the causes aforesaid your Petitioner would pray that your Honor appoint a day for your Petitioner's final (or partial) settlement, and direct the giving of proper notice thereof to the heirs as aforesaid, and appoint a guardian ad litem for the said minor heirs, and said heirs non compos mentis, and a special guardian for such unknown heirs, and an administrator ad litem for the estate of said ....., and that your Honor order a reference to the Register of this Court to examine and audit your Petitioner's account herewith filed and to ascertain whether the heirs herein given are the true heirs, and who are the unknown heirs, giving proper notice to all parties concerned of the time of holding said reference; and to report to this Court upon the correctness of the said account, and the names of the heirs. And your petitioner would further pray that he be allowed the cost of employing real estate agents to make said leases and collect said rents as aforesaid, and that the making of the said leases by him be approved, and that your honor make an order directing the payment of the costs of his administration in the Probate Court of this county, and the costs incurred up to this time in this Court.

And if your Petitioner has not asked for the proper relief, he would now ask such proper relief, and he would also ask such other and further relief as equity and the nature of the case demand. And your Petitioner would ever pray.

C. D

L. Forms for Decrees of Reference, Report of Reference, and Proceedings Thereon.

66. Form for a Decree of Reference.

N. B. This decree is upon the above petition, but the form may be adapted to any decree of reference.

A. B. Plaintiff v. C. D. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

Decree of Reference on Report and Petition of Administrator for annual settlement of his accounts.

This cause coming on this day again to be heard on the report and statement of account and vouchers of the Defendant C. D. as administrator of the estate of E. F., deceased, together with the petition thereto attached filed in this cause on the .....day of..... 19...., and also upon the supplementary statement of account of the said C. D., as administrator filed in this cause on the.....day of .....19...., both of which statements with the petitions therein have been set down for hearing before the Court on this day, after proper notice to all parties to this cause under the practice of this Court; and it appearing to the Court that K. L. Esq., a Solicitor of this Court, has already been appointed by this Court Guardian ad Litem for the minor heirs, and the heirs non compos mentis of the intestate E. F., deceased, as set forth in said petition, and Administrator ad Litem for the estate of the said F. H.; the said K. L., being present in Court at the hearing of said petitions, and acting in said capacities; and it further appearing to the Court from the record in this cause that the defendant J. F., is the widow of the said E. F., deceased, and that said E. F., died without issue, and that his said widow is entitled to all the personal property of which he died possessed after the payment of the debts of the intestate chargeable thereon; and it further appearing to the Court that since the filing of the said petition and report on the.....day of.....19...., dower by metes and bounds in the real estate of the said intestate has been confirmed to the said defendant as widow of said intestate, and that the Court has further decreed to her, by decree rendered on the.....day of.....19...., her mesne profits upon the property so set apart to her as dower out of the rents collected by the defendant C. D. as administrator from the real estate of said intestate, and that any balance left in his hands from said rents as shown by said

statements filed after the payment of said mense profits, should be distributed to the heirs of said intestate, or their representatives entitled thereto after the payment of the proper charges thereon; and the Court having heard arguments from the Solicitor for the Plaintiff A. B., and from the Solicitor for the petitioner, said Defendant C. D., and from said Guardian ad litem and Administrator ad litem, for and against the prayers of said Petitions; it is now ordered, adjudged and decreed that the said petition, statement of accounts and vouchers filed on the.....day of.....19...., and the said petition, statement of accounts and vouchers filed on the ..... day of.....19...., be and they are hereby referred to the Register of this Court, to hold a reference, of the time of which he shall give notice to all parties of record or their solicitors of record as provided by law; and at said reference he shall:

(1) Examine and audit the accounts of petitioner and the vouchers filed by the petitioner with his statements of accounts as aforesaid, and summon witnesses, if need be, and hear testimony and ascertain and report to the Court his conclusions upon the correctness of each statement of accounts; and in case he shall not allow any item or items as charged by said administrator, he shall report with his conclusion, the testimony he may have taken upon such item;

(2) He shall hear testimony, ascertain, and report to the Court, whether the heirs of the said E. F., deceased, are properly set forth in the said petition filed on the ..... day of ....., 19...., and if not, who are the heirs of the said decedent or their representatives, and what are the proportions in which they are respectively entitled to share in said estate.

(3) He shall hear testimony, ascertain, and report to the Court, whether it was to the interest of said estate that the administrator should make leases of the several properties of the estate as reported in his said petition and collect the rents through real estate agents, and if so, whether he should be allowed the amount of the items paid Real Estate Agents as shown in his statements for collecting the same;

(4) He shall hear testimony, ascertain, and report to the Court, what is a fair compensation to be allowed the Peti-

tioner as administrator, for his trouble, risk and responsibilty, in and about the administration of said estate up to this time;

(5) He shall hear testimony, ascertain, and report to the Court, what leases are now existing upon the property of the estate other than that out of which the dower and homestead exemption were set apart;

(6) He shall hear testimony and ascertain, and report to the Court, whether the remaining averments of the said petition are true;

(7) He shall hear testimony, ascertain, and report to the Court, what are the court costs incurred in the administration of this estate and in the proceedings therein for setting apart dower and homestead both in the Probate Court of..... County, and in this Court.

And all other matters are reserved by the Court for further action in said cause.

Ordered, adjudged and decreed this..... day of..... 19....

.....

Chancellor.

67. Form for Report of Register on a Reference.

N. B. This form is taken from a report of John W. Altman, Esq., Register in Chancery for the 5th District of the Northwestern Chancery Division, consisting of the County of Jefferson. This report is upon the reference ordered under the decree in the above form, No. 65, but may be adapted to any report by a register.

A. B. Plaintiff vs. C. D. Admr. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

To the Honorable....., Chancellor of the..... Chancery Division of Alabama, sitting for the..... District thereof:

WHEREAS, by decree of this Court filed and enrolled in the above entitled cause on the..... day of.....,

19...., it was ordered and decreed, among other things, as follows:

"It is now ordered, adjudged and decreed that the said petition, statement of account and vouchers, filed....., 19...., and the said petition, statement of accounts and vouchers filed.....19...., be and they are hereby referred to the Register of this Court, to hold a reference, of the time of which he shall give notice to all parties of record or their solicitors of record as provided by law, and at said reference he shall: (Here set out the language of the decree of reference, an example of which is given above.)

NOW, THEREFORE, having held a reference for the purpose of ascertaining the matters called for in said decree of reference I report as follows:

1. I report that the hearing on the reference was had in my office in the Court House of..... County, Alabama, on the.....day of.....19...., and the hearing was continued from day to day to the....., days of 19....; that due notice of the time and place of holding said reference was given to all parties of record or their solicitors of record as provided for in said decree, and that at said hearing there were present the following:

(Here set out the names of the parties present at the reference, or the solicitors, with the names of the respective parties represented by them.)

2. I report that I have examined and audited the accounts of the Petitioner as directed, and also have examined and audited the vouchers and statements of account referred to in said decree; and I find each statement of account to be correct, and each item thereof properly allowable.

3. I find and report that it was to the interest of the said estate that the administrator should make leases of the several properties of the estate as reported in his said petition, and that it was to the interest of the said estate that the administrator collect the rents through real estate agents as was done by him; and further that he should be allowed the amount of the items paid the real estate agents for collecting the rents as is shown in his statements.

4. I find and report the sum of $..... to be a fair com-

pensation to be allowed the Petitioner in this cause, as Administrator, for his trouble, risk and responsibility, in and about the administration of the said estate up to this time.

This is an allowance of 2½% on receipts and 2½% on disbursements; the calculation of the same is as follows:

(Here insert itemized calculation.)

5. I find and report that the following leases are now existing upon the property of the estate other than that out of which the dower and homestead exemption were set apart:

6. I find and report that the remaining material averments of the petition filed by said administrator are true.

7. I find and report that the costs of the Probate Court of Jefferson County, Alabama, which have been incurred in the administration of this estate amount to $....., as shown by fee bill hereto attached.

I report that the court costs incurred in the administration of this estate, not including the proceedings therein for setting apart dower and homestead, amount to a total of $....., as follows:

Register's fees .....$
Sheriff's fees .....$
Printer's fees .....$
Commissioner's fees .....$

And that the Court costs incurred in the administration of this estate arising in the proceedings therein for setting apart dower and homestead, amount to $..... Of this amount $..... has been allowed to the Commissioners in connection with the setting apart of dower, ... dollars being allowed to each Commissioner for his services therein. And as to this $..... Item, I report it by the agreement of the Solicitors of Record, Guardian ad Litem and Administrator ad Litem. The costs are as follows:

Register's fees .....$
Sheriff's fees .....$
Commissioner's fees .....$
Fees of Commissioners on Homestead.....$
Fees of Commissioners on Dower.....$

I report that a fee of $..... dollars is a reasonable allowance to be made the Commissioners in redower.

Cost bills showing each item of costs which have accrued in this Court will be found on the Fee Book.....

In addition to the $....., the court costs incurred in the administration of this estate as reported above, not including the proceedings for setting apart dower and homestead, and the amount of $....., reported above as costs arising in this cause in re petition and proceedings therein for setting apart dower and homestead, there is an item of costs, to wit, a fee for the services of the Guardian ad Litem herein, which should be allowed, and added to the total costs. And I report that an allowance of $..... is a reasonable and proper amount to be allowed the Guardian ad Litem for his services in this cause up to the present time.

8. I find that E. F., intestate, died on..... of..... 19...., leaving heirs as follows:

(Here set out heirs, and the proportions in which they are respectively entitled to share in the estate.)

All of which is respectfully submitted this..... day of ....., 19....

.....

Register in Chancery.

It is usually advisable to attach to the report the testimony taken upon the reference, whether the decree requires the testimony to be reported or not.

68. Form for Exceptions to a Register's Report on a Reference. It may be adapted to any report by changing the matter.

A. B. Plaintiff v. C. D. Admr. et als. Defendants.	No..... In the Chancery Court for..... County, Alabama.

And now comes the plaintiff in the above entitled cause and excepts to the report and findings of the Register of this Court herein filed on the.....day of.....19...., and for cause for exception, he says:

(1) That he excepts to the general finding in paragraph six of the said report that the statements contained in the said petition are true, for the reason that the testimony set forth

and attached to the finding and report of the Register do not sustain the said report but are contradictory thereof.

(2) That he further excepts to the said report and the findings of the said Register as set forth therein as to the items of the account of the said administrator hereinafter noted, and which are particularly referred to in paragraph two of the said report; because, as the plaintiff says, items of the said account of the said administrator represented by the vouchers numbered in the said report as hereinafter numbered, were each a debt and charge against the estate of the said decedent, and each was and is a debt and charge against the personal estate of the decedent, which is ample and sufficient to pay the same, as shown by the reports of said administrator; and because the said items so enumerated, and each of them, was not and is not a debt and charge against the real estate of the said decedent or the proceeds thereof, as found by the said Register.

(Here set out items and vouchers referred to.)

Wherefore the plaintiff excepts to the said report, and prays the judgment of this Court if his exceptions are not well taken.

.....

Solicitor for Plaintiff.

69. Form for a decree overruling exceptions and confirming report of Register.

A. B. Plaintiff v. C. D. Defendant.	No..... In the Chancery Court for..... County, Alabama.

This cause coming on again this day to be heard upon the report of the Register filed in this cause and read in open Court on the.....day of.....190...., upon a reference ordered on the.....day of.....19...., and upon the exceptions to said report taken by the Plaintiff and filed in this cause on.....day of.....19...., and the Court having heard the exceptions and having heard arguments in support of them by the Solicitor for the Plaintiff and by the Guardian ad Litem; and it appearing to the Court that the said exceptions are not well taken and that the said report of the Register should be confirmed, it is now ordered adjudged and decreed that the said exceptions taken

by the Plaintiff be and the same are hereby severally overruled, and that the said report of the Register filed on the .....day of.....19...., be and the same is in all respects hereby confirmed.

Ordered, adjudged and decreed this..... day of....., 19....

.....

Chancellor

70. Form of a Decree of Sale for Division in a suit for that purpose.

A. B. Plaintiff
v.
C. D. et als.
Defendants.

No.....
In the Chancery Court for.....
County, Alabama.

DECREE.

This cause coming on the..... instant to be heard before the Chancellor upon the Bill of Complaint as last amended, and the several answers of the defendants, (Here insert the names of defendants.) and of the minor defendants. (Here insert the names of the minor defendants.) by their Guardian ad Litem, and the answer of the defendant .....to the Original Bill, and Decree Pro Confesso against him as to the amendments thereto, and upon Decrees pro confesso against all other parties Defendant; and upon the evidence submitted in support of the Bill of Complaint, and the several answers thereto; and the Plaintiff and the Defendants..... being present in the Court in person or by counsel, and the said minor defendants being present by their said Guardian ad Litem; and the Court having heard arguments of counsel for the Plaintiff and for the Defendants, (here insert names of defendants), and for the said minors; and the Court having taken the cause under further advisement; and it appearing to the court that the Plaintiff, ..., is the owner in fee simple of an undivided interest in the property described in the Bill of Complaint, that is to say: (Here set out property.) in the City of....., Alabama and that the said property cannot be equitably divided so as to set off to Plaintiff his

interest therein by metes and bounds, and that a sale of the said property for division is necessary, and that the Plaintiff is therefore entitled to the relief asked:

It is therefore ordered, adjudged and decreed that the Bill of Complaint as last amended has equity; that the Plaintiff is the owner in fee simple of an undivided ..... interest in said property, that the defendant..... is the owner in equity in his own right, of..... interest in said property, charged however, with the amount shown by the evidence to be still owing by said..... to the Defendant, ... and secured by the mortgages copies of which are attached to the deposition in evidence of....., said charge amounting to $..... with interest from ..... 19...., and that the remaining interest in said property is owned by the minor defendants.

(Here set out the names of the minor defendants).

And it is further ordered, adjudged and decreed in compliance with the equities of the Bill that the said claims held by the defendant....., on the interest of Defendant..... be foreclosed; and that the entire property be sold free of all liens, claims, or incumbrances of any parties to this suit, [N. B. If the mortgagee does not consent, the property cannot be so sold] and it is hereby ordered that the Register of this Court shall so offer for sale and sell the same in front of the Court House door of this County at public sale to the highest bidder for cash, after giving three weeks' notice of the time, terms, and place of sale by publication once a week for three successive weeks in (a newspaper) published in the City of .....in said County; and further that the said Register report any sale he may make under this decree to this Court for confirmation and collect and hold the purchase money he may receive for the further orders of this Court. It is further ordered that any of the aforesaid parties herein above decreed to have an interest in said property, may in case of becoming purchaser at said sale, obtain a credit upon the purchase price to the proportion of their aforesaid interest in the property, upon paying or securing to the Register the like proportion of the costs of this suit.

And this cause is retained for further orders in pursuance of this decree.

Ordered, adjudged and decreed this.....day of.....19....

.....

Chancellor.

71. Form for decree Confirming sale of real estate for division and ordering reference for fees.

A. B. Plaintiff
v.
C. D. et als.
Defendants.

No.....
In the Chancery Court for..... .....
County, Alabama.

This cause this day coming on to be heard on the Report of the Register, filed in this cause on the..... day of .....19...., reporting that in pursuance of the decree in this cause made on he.....day of.....19...., ordering a sale of the property described in the Bill of Complaint, being..... in the City of....., in said County, he did on.....day of.....19...., within the legal hours of sale, in front of the Court House door in the City of..... in said County, offer for sale and sell the said property at public outcry to the Plaintiff in this cause for $..... cash, which was the highest and best bid therefor, and had received the purchase money therefor in compliance with the terms of said decree of sale; and said report having lain over more than one day and no exceptions having been taken thereto, and it appearing to the Court that the said sale was fairly conducted, and that $..... the price for which said property was sold, was not disproportionate to the value thereof, and that said sale ought to be confirmed to the purchaser, it is ordered, adjudged and decreed, that said sale to the Plaintiff be, and it hereby is, in all respects fully ratified and confirmed; and the Register of this Court is hereby ordered and directed to execute to said ....., a full and proper deed conveying to him all the interest in said property both legal and equitable heretofore held by any and all the parties to this cause.

And it is further ordered that the Register shall hold a

reference to ascertain what is a reasonable fee to be paid the solicitors in this cause, and a reasonable fee to be paid the Guardian ad Litem for the minor defendants:

(Here insert the names of the minor defendants)

to be paid out of the proceeds of said sale, and report his finding thereupon to the Court for further orders in this cause.

Ordered, adjudged and decreed, this.....day of....., 19....

.....

Chancellor.

72. Form for order confirming report of register on reference and directing distribution.

This cause this day coming on again to be heard on the Report of the Register in this cause read in open Court and filed on the.....day of.....19...., made under the order of reference made on the..... day of....., 19...., by which report it appears that the Register has found that a reasonable Attorney's fee to be allowed the Solicitors in this cause is $....., and that a reasonable fee to be paid the Guardian ad Litem for the Minor defendants.

(Here insert the names of the minor defendants)

is $.....; both to be paid out of the proceeds of the sale referred to in said decree of Reference; and said report having lain over more than..... days, and the only exceptions taken thereto, being those taken by..... Esq., by paper filed on the.....day of.....19...., having been overruled by the Court after hearing thereof in open Court; And it appearing to the Court that the fees as so reported by the Register, are not unreasonable remuneration for the services rendered; it is ordered, adjudged and decreed that the report of the Register as made be and it hereby is approved, and the Register is hereby ordered to pay to the Solicitors, share and share alike, the said $.....; and to the Guardian ad Litem for the said Minor defendants $.....; and after paying the further costs remaining unpaid in this cause, to distribute the balance of the proceeds of sale in his hands to the parties decreed to be entitled thereto in proportion to their interests as found by this Court in the decree in this cause rendered on the.....day of.....19....,

But before paying over to the said defendant..... the proportion of said proceeds coming to him, the Register shall deduct therefrom the amount of unpaid mortgage indebtedness of said defendant..... thereon, which was found by said decree to be due the defendant....., to wit, $.....with interest from.....19...., which amount the Register shall pay over to said defendant .....

And it is further ordered that the Register take full and adequate receipts from the several parties and persons to whom he shall pay the said funds. And when he shall have fully performed this order, he shall report the same to this Court.

Ordered, adjudged and Decreed this..... day of..... 19....

.....

Chancellor.

APPENDIX B.

A List of the Courts Exercising Chancery Jurisdiction in the Several Counties in the State of Alabama, together with the Names of the Towns or Cities in which they Sit, and the Times and Lengths of their various Terms:

Autauga County, is the 16th District of the Northeastern Chancery Division. The Chancery Court sits at Prattville, the county seat, on the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

Baldwin County, is a part of the 13th District of the Southwestern Chancery Division which district is composed of the Counties Baldwin and Mobile. The Chancery Court sits for the 13th District at Mobile in Mobile County on the third Monday after the fourth Mondays in March and September, and may continue four weeks.

Code of 1907, sec. 3047.

Barbour County, is the 14th District of the Southeastern Chancery Division. The Chancery Court sits at Eufaula, the county seat, on the third Mondays in March and September, and may continue one week.

Code of 1907, sec. 3046.

Bibb County, is the 4th District of the Southwestern Chancery Division. The Chancery Court sits at Centreville, the county seat, on the first Monday after the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Blount County, is the 1st District of the Northwestern Chancery Division. The Chancery Court sits at Oneonta, the county seat, on the first Mondays in March and September, and may continue four days.

Code of 1907, sec. 3045.

Bullock County, is the 9th District of the Southeastern Chancery Division. The Chancery Court sits at Union Springs, the county seat, on the Thursday after the second Mondays in March and September, and may continue three days.

Code of 1907, sec. 3046.

Butler County, is the 3rd District of the Southeastern Chancery Division. The Chancery Court sits at Greeneville, the county seat, on the second Mondays in January and July, and may continue one week.

Code of 1907, sec. 3046.

Calhoun County, is the 9th District of the Northeastern Chancery Division. The Chancery Court sits at Anniston, the county seat, on the fourth Mondays in May and November, and may continue three days.

Code of 1907, sec. 3044.

The City Court of Anniston also has equity jurisdiction in the county concurrent with the Chancery Court. The procedure in equity is the same as in the chancery court. This court shall hold two regular terms in each year: Special terms may also be held when in the opinion of the judge of said court it shall be necessary for the proper transaction of business, of which special term ten days notice shall be given by publication in some newspaper published in the City of Anniston. Regular terms of said Court shall be held as follows: Beginning on the third Monday in January in each year and continuing until the last Saturday in June, and on the third Monday in September in each year and continuing until the third Saturday in December. Acts of Ala. 1896-7, p. 324.

The Court was created by Act of Ala. 1888-9 p. 564.

Chambers County, is the 1st District of the Northeastern Chancery Division. The Chancery Court sits at Lafayette, the county seat, on the first Thursday after the first Mondays in June and December, and may continue three days.

Code of 1907, sec. 3044.

Cherokee County, is the 13th District of the Northeastern Chancery Division. The Chancery Court sits at Centre, the county seat, on the third Mondays in May and November, and may continue three days.

Code of 1907, sec. 3044.

Chilton County, is the 7th District of the Northeastern Chancery Division. The Chancery Court sits at Clanton, the county seat, on the second Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

Choctaw County, is the 11th District of the Southwestern Chancery Division. The Chancery Court sits at Butler, the county seat, on Friday after the first Monday after the fourth Mondays in March and September, and may continue two days.

Code of 1907, sec. 3047.

Clarke County, is the 1st District of the Southwestern Chancery Division. The Chancery Court sits at Grove Hill, the county seat, on Thursday after the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Clay County, is the 12th District of the Northeastern Chancery Division. The Chancery Court sits at Ashland, the county seat, on the second Mondays in May and November, and may continue three days.

Code of 1907, sec. 3044.

Cleburne County, is the 10th District of the Northeastern Chancery Division. The Chancery Court sits at Heflin, on the third Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

Coffee County, is the 11th District of the Southeastern Chancery Division. The Chancery court sits at Elba, the county seat, on Friday after the first Mondays in February and August, and may continue two days; and also at Enterprise, on the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3046. And see Local Acts of Ala. 1907 p. 221.

Colbert County, is the 2nd District of the Northern Chancery Division. The Chancery Court sits at Tuscumbia, the county seat, on the second Mondays in February and August, and may continue one week.

Code of 1907, sec. 3043.

Conecuh County, is the 2nd District of the Southeastern Chancery Division. The Chancery Court sits at Evergreen, the county seat, on Thursday after the first Mondays in January and July, and may continue three days.

Code of 1907, sec. 3046.

Coosa County, is the 4th District of the Northeastern Chancery Division. The Chancery Court sits at Rockford, the county seat, on the first Thursday after the second Mondays in June and December, and may continue three days.

Code of 1907, sec. 3044.

Covington County, is the 16th District of the Southeastern Chancery Division. The Chancery Court sits at Andalusia, the county seat, on Friday before the first Mondays in January and July, and may continue two days.

Code of 1907, sec. 3046.

Crenshaw County, is the 4th District of the Southeastern Chancery Division. The Chancery Court sits at Luverne, the county seat, on Thursday after the third Mondays in January and July, and may continue three days.

Code of 1907, sec. 3046.

Cullman County, is the 7th District of the Northern Chancery Division. The Chancery Court sits at Cullman, the county seat, on Thursday after the first Monday after the fourth Mondays in February and August, and may continue three days; and also on Thursday after the second Mondays in June and December, and may continue three days.

Code of 1907, sec. 3043.

Dale County, is the 12th District of the Southeastern Chancery Division. The Chancery Court sits at Ozark, the county seat, on Thursday after the fourth Mondays in April and October, and may continue three days.

Code of 1907, sec. 3046.

Dallas County, is the 5th District of the Southwestern Chancery Division. The Chancery Court sits at Selma, the county seat, on Thursday after the seventh Monday after the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

The City Court of Selma also has equity jurisdiction in the county concurrent with the Chancery Court. The procedure in equity is the same as in the chancery court. This court "shall hold two regular terms each year, beginning on the first Mondays in January and June of each year, and may

continue in session until the business is disposed of. Special terms may also be held when in the opinion of the judge they are necessary for the dispatch of business. Twenty days' notice of special terms shall be given in a newspaper published in Selma." Acts of Ala. 1875-6, p. 386.

DeKalb County, is the 13th District of the Northern Chancery Division. The Chancery Court sits at Fort Payne, the county seat, on the second Mondays in May and November, and may continue three days.

Code of 1907, sec. 3043.

Elmore County, is the 8th District of the Northeastern Chancery Division. The Chancery Court sits at Wetumpka, the county seat, on the first Thursday after the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

Escambia County, is the 1st District of the Southeastern Chancery Division. The Chancery Court sits at Brewton, the county seat, on the first Mondays in January and July, and may continue three days.

Code of 1907, sec. 3046.

Etowah County, is the 15th District of the Northeastern Chancery Division. The Chancery Court sits at Gadsden, the county seat, on the first Thursday after the third Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

The City Court of Gadsden has equity jurisdiction in the county concurrent with the chancery court. The procedure in equity is the same as in the chancery court. The court was created by Acts of Ala. 1890-91, p. 1092, and equity jurisdiction was conferred by Acts of Ala. 1894-5 p. 1218. An additional judge, as associate judge, was added to the court by Local Acts of Ala. 1907 p. 191. Two regular terms of this court are provided for: one beginning on the third Monday in January in each year, and continuing until the last Saturday in June, and the other on the third Monday in September of each year, and continuing until the third Saturday in December. And court may be temporarily adjourned at any time if the business does not require its continuous sitting. Acts of Ala. 1900-01, p. 1288.

Fayette County, is the 3rd District of the Northwestern Chancery Division. The Chancery Court sits at Fayette, the county seat, on the second Monday in February and the first Monday in October, and may continue one week.

Code of 1907, sec. 3045.

Franklin County, is the 1st District of the Northern Chancery Division. The Chancery Court sits at Russellville, the county seat, on Thursday after the first Mondays in February and August, and may continue three days.

Code of 1907, sec. 3043.

Geneva County, is the 15th District of the Southeastern Chancery Division. The Chancery Court sits at Geneva, the county seat, on the fourth Mondays in April and October, and may continue two days.

Code of 1907, sec. 3046.

Greene County, is the 8th District of the Southwestern Chancery Division. The Chancery Court sits at Eutaw, the county seat, on Thursday after the third Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Hale County, is the 7th District of the Southwestern Chancery Division. The Chancery Court sits at Greensboro, the county seat, on the third Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Henry County, is the 13th District of the Southeastern Chancery Division. The Chancery Court sits at Abbeville, the county seat, on Thursday after the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3046.

Houston County, is the 17th District of the Southeastern Chancery Division. The Chancery Court sits at Dothan, the county seat, on Thursday after the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3046.

Jackson County, is the 9th District of the Northern Chancery Division. The Chancery Court sits at Scottsboro, the

county seat, on the first Mondays in May and November, and may continue one week.

Code of 1907, sec. 3043.

Jefferson County, is the 5th District of the Northwestern Chancery Division. The Chancery Court sits at Birmingham, the county seat, on the first Monday in January, and continues to July 15th for the first or Spring Term, and on the second Monday in September and may continue to and including December 23, for the second or Fall Term. Such adjournments may be taken from time to time during the terms as may be required for the Chancellor to hold the regular and special terms in the other four Districts of the Northwestern Chancery Division.

Code of 1907, sec. 3045.

The City Court of Birmingham also has equity jurisdiction in the County concurrent with the Chancery Court. The procedure in equity is the same as in the Chancery Court. This court holds one regular term in each year commencing on the first Monday in October and ending on the last day of the succeeding June not a Sunday. See Local Acts of Ala. 1907 p. 254; Local Acts of Ala. 1907 p. 718. The former act provides that the court shall have four judges.

The City Court of Birmingham was founded by an Act approved December 9, 1884. See Acts of Ala. 1884-5, p. 216. Amendatory Acts may be found in Acts of Ala. 1888-9 p. 992; Acts of 1890-91 p. 1365; Local Acts 1896-7 p. 1263; Acts 1900-01 p. 352; all of which except those of 1907 may be found compiled in Local Laws Jefferson County p. 590.

The Circuit Court of Jefferson County also has equity jurisdiction in the County concurrent with the chancery court. The procedure in equity is the same as in the chancery court. The Circuit Court sitting as a Court of Chancery shall set apart certain days during the terms for the hearing and determination of equity causes pending. Acts of Ala. 1894-5 p. 881. See Local Laws of Jefferson County, p. 609.

Jefferson County is the 10th Judicial Circuit of Alabama, and the Circuit Court sits at Birmingham on the first Monday in October and may continue to and including the 31st day of December unless a Sunday, in which even to and including

the following Monday; also on the first Monday in January, and may continue to and including the 30th day of June unless a Sunday, in which event to and including the following Monday.

Code of 1907, sec. 3240.

An additional judge was provided for the Circuit Court of Jefferson County, that is, the 10th Judicial Circuit, by Acts of Ala. 1907 p. 260.

The Bessemer Division of the Circuit Court of Jefferson County sitting at Bessemer was abolished by Acts of Ala. 1900-01 p. 2443.

The City Court of Bessemer also has equity jurisdiction concurrent with the chancery court in that part of Jefferson County embraced in Precincts 1, 2, 3, 4, 5, 7, 24, 27, 33, 35, 40 and 41, and to personal actions the causes of which arise within said designated limits, whether the parties reside therein or not. Acts of Ala. 1903, p. 472; Local Acts of Ala. 1907, p. 352. When sitting in equity the procedure is the same as that in the chancery court. The City Court of Bessemer holds one regular term in each year commencing on the first Monday in September and ending on the last day of the succeeding June, unless a Sunday, and in that event on the next day preceding; and the court may hold special or adjourned terms when in the opinion of the judge it is necessary to do so for the proper transaction of the business of the court. Ten days' notice of special terms are required, but the method of notice is not specially prescribed. Acts of Ala. 1900-01, p. 1854. Other amendatory Acts but not affecting the jurisdiction or terms of this court are Local Acts of Ala. 1907, p. 566, and p. 690. The Acts prior to those of 1907 are compiled in Local Laws of Jefferson County, p. 115.

Lamar County, is the 11th District of the Northern Chancery Division. The Chancery Court sits at Vernon, the county seat, on the third Mondays in April and October, and may continue three days.

Code of 1907, sec. 3043.

Lauderdale County, is the 3rd District of the Northern Chancery Division. The Chancery Court sits at Florence, the

county seat, on the third Mondays in February and August, and may continue one week.

Code of 1907, sec. 3043.

Lawrence County, is the 4th District of the Northern Chancery Division. The Chancery Court sits at Moulton, the county seat, on the fourth Mondays in February and August, and may continue three days.

Code of 1907, sec. 3043.

Lee County, is no longer in any Chancery Division of Alabama, and a chancery court as such does not sit there. Acts of Ala. 1907, p. 242. By Acts of Ala. 1907, p. 263, there was established the Lee County Court of Law and Equity, which has the jurisdiction formerly held by the chancery court in Lee County. The procedure of this new court when sitting in equity is the same as the chancery court. This court shall hold two regular terms in each year. The first shall begin on the second Monday in January, and may continue until the third Saturday in June, and the second shall begin on the fourth Monday in July and may continue until the second Saturday in December of each year. The judge is empowered to designate a separate week or weeks for the trial of equity cases. The court sits at Opelika, the county seat.

Acts of Ala. 1907 p. 496.

Limestone County, is the 5th District of the Northern Chancery Division. The Chancery Court sits at Athens, the county seat, on the first Monday after the fourth Mondays in February and August; and may continue three days.

Code of 1907, sec. 3043.

Lowndes County, is the 5th District of the Southeastern Chancery Division. The Chancery Court sits at Hayneville, the county seat, on the fourth Mondays in January and July, and may continue one week.

Code of 1907, sec. 3046.

Macon County, is the 7th District of the Southeastern Chancery Division. The Chancery Court sits at Tuskegee, the county seat, on the third Mondays in January and July, and may continue three days.

Code of 1907, sec. 3046.

Madison County, is the 8th District of the Northern Chancery Division. The chancery court sits at Huntsville, the county seat, on the first Monday in April and the third Monday in September, and may continue one week.

Code of 1907, sec. 3043.

The Circuit Court of Madison County also has equity jurisdiction in the county concurrent with the chancery court. The judge is required to designate certain days during the terms for the hearing and determination of equity cases pending. The procedure in the circuit court sitting in equity is the same as in the chancery court. The Register of the chancery court is also Register of the circuit court sitting in chancery. Acts of Ala. 1894-5 p. 881.

Madison County is the 8th Judicial Circuit of Alabama, and the Circuit Court holds three terms there in each year. The first term begins on the second Monday in February and continues three weeks, the first two weeks to be devoted to the transaction of civil and the last week to the transaction of criminal business, if any there be; but civil and criminal business may be disposed of interchangeably at the discretion of the judge. The second and third terms begin on the third Mondays in May and November respectively and may continue two weeks.

Code of 1907, sec. 3238.

The Law and Equity Court of Madison County, created by Acts of Ala. 1907 p. 189, Local Acts of Ala. 1907 p. 262, amended Local Acts of Ala. 1907, p. 606, also has equity jurisdiction in the county concurrent with the chancery court. The procedure in equity is the same as in the chancery court. The register of the chancery court is ex officio register of this court. "This court shall be held on the first Monday in March and may continue until the last Saturday in June inclusive, in each and every year; and on the first Monday in October, and may continue until the last Saturday in February inclusive, in each and every year; and at such terms shall transact all business civil, criminal, or in equity in such order as the judge may direct or see fit." Local Acts of Ala. 1907, p. 606.

Marengo County, is the 12th District of the Southwestern Chancery Division. The Chancery Court sits at Linden, the

county seat, on the second Monday after the fourth Mondays in March and September, and may continue six days.

Code of 1907, sec. 3047.

Marion County, is the 12th District of the Northern Chancery Division. The Chancery Court sits at Hamilton, the county seat, on Thursday after the third Mondays in April and October, and may continue three days.

Code of 1907, sec. 3043.

Marshall County, is the 10th District of the Northern Chancery Division. The Chancery Court sits at Guntersville, the county seat, on Thursday after the second Mondays in May and November, and may continue three days.

Code of 1907, sec. 3043.

Mobile County, is a part of the 13th District of the Southwestern Chancery Division, which District is composed of the counties of Baldwin and Mobile. The Chancery Court sits for the 13th district at Mobile, the county seat of Mobile County, on the third Monday after the fourth Mondays in March and September, and may continue four weeks.

Code of 1907, sec. 3047.

The City Court of Mobile has no equity jurisdiction; but the judge thereof has the powers exercised by the judges of the circuit courts of the State with reference to the granting or issue of writs of injunction and other remedial writs returnable to courts exercising equity jurisdiction. Acts of Ala. 1890-91 p. 1280; Acts of Ala. 1888-9 p. 210.

The Law and Equity Court of Mobile, created by Acts of Ala. 1907, p. 562, has equity jurisdiction in the county concurrent with the chancery court. The procedure in equity is the same as in the Chancery Court. The Register of the Chancery Court "of Mobile County" is ex-officio register of this court sitting in equity. This court "shall have one term per year, beginning on the first Monday of October and lasting until and including the 31st day of July next following. The presiding judge may adjourn said court for as long a time during the term as to him seems proper. "But the judge's absence shall not constitute the lapse of the term; for the clerk or register or both, or the judge by written order transmitted to and filed by said clerk or register, may order court

adjourned to such time as he or they think proper. "No term shall for any cause be adjourned sine die until the time for ending thereof fixed by law." And the judge may reconvene the court for the transaction of any business at any time, by consent of the parties, before the time fixed by previous order of adjournment.

Monroe County, is the 2nd District of the Southwestern Chancery Division. The Chancery Court sits at Monroeville, the county seat, on the seventh Monday after the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Montgomery County, is the 6th District of the Southeastern Chancery Division. The Chancery Court sits at Montgomery, the county seat, on the first Mondays in April and October, and may continue three weeks.

Code of 1907, sec. 3046.

The City Court of Montgomery has equity jurisdiction in the county concurrent with the chancery court. The procedure in this court when sitting in equity is the same as in the chancery court. The court is provided with two judges, a judge and an associate judge. Acts of Ala. 1900-01, p. 824. This court holds an October term on the first Monday in October of each year, and continuing until Saturday before the second Monday in July following, and also a July term beginning on the second Monday in July of each year and continuing until the Saturday before the first Monday in October following "unless sooner adjourned by an order thereof." Local Acts of Ala. 1907 p. 300. This Act recognizes also a February term "for the trial of criminal causes in said court as heretofore provided by law." Acts of Ala. 1900-01 p. 122 had provided for three terms. The City Court of Montgomery was established Acts of Ala. 1863, p. 121. Jurisdiction in chancery was conferred upon it by Acts of Ala. 1880-81, p. 267.

Morgan County, is the 6th District of the Northern Chancery Division. The Chancery Court sits at Decatur, the county seat, on the second Monday after the fourth Mondays in February and August, and on the first Monday in June, and may continue one week.

Code of 1907, sec. 3043.

The City Court of Decatur established Acts of Ala. 1888-9, p. 316 with equity jurisdiction was abolished, Acts of Ala. 1894-5, p. 35. Equity jurisdiction was conferred upon the circuit court of Morgan County by Acts of Ala. 1894-5, p. 881, but was abolished by Acts of Ala. 1900-01, p. 1852.

The Morgan County Law and Equity Court was created by Acts of Ala. 1907, p. 170, (same Act Local Acts 1907, p. 193) with equity jurisdiction in the county concurrent with the chancery court. The procedure when sitting in equity is the same as in the chancery court. "There shall be two regular terms of said court in each year, one to be known as the Spring term and one as the Fall term." The Spring term shall begin on the first Monday in February, and may continue five months. The Fall term shall begin on the first Monday in September, and may continue for four months, or during the remainder of the year. But apparently the above is not binding because the Act also provides that the "court shall be held in each year as may be determined and fixed by the presiding judge," both the time and manner of holding the session of the court, "and the week or weeks in which equity cases shall be tried." The Act creating the court was amended by Acts of Ala. 1907, p. 633, providing among other things, "That at any time during the vacation or during any regular term of said court if, in the opinion of the judge of this court a session of the court shall be held, the judge of this court, upon making a minute entry thereof, is hereby empowered and authorized, to declare this court in session for such purpose or purposes, that he may deem proper * * *."

Perry County, is the 6th District of the Southwestern Chancery Division. The Chancery Court sits at Marion, the county seat, on Thursday after the second Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Pickens County, is the 9th District of the Southwestern Chancery Division. The Chancery Court sits at Carrollton, the county seat, on Thursday after the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Pike County, is the 10th District of the Southeastern Chan-

cery Division. The Chancery Court sits at Troy, the county seat, on the first Mondays in February and August, and may continue four days.

Code of 1907, sec. 3046.

Randolph County, is the 11th District of the Northeastern Chancery Division. The Chancery court sits at Wedowee, the county seat, on the first Mondays in June and December, and may continue three days.

Code of 1907, sec. 3044.

Russell County, is the 8th District of the Southeastern Chancery Division. The Chancery Court sits at Seale, the county seat, on the second Mondays in March and September, and may continue three days.

Code of 1907, sec. 3046.

St. Clair County, consists of two Chancery districts, both in the Northeastern Chancery Division; the territory lying within precincts numbered 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, and 21 of St. Clair County constitutes and is called the Southern Chancery District of St. Clair County, and the territory embraced in the remainjng precincts of St. Clair County as now laid off, constitutes the Northern Chancery District of St. Clair County.

The Chancery Court sits for the Northern District of the county at Ashville, the county seat, on the first Thursday after the third Mondays in May and November, and may continue three days; and also sits for the Southern District of the county at Pell City on the fourth Mondays in February and August and may continue three days.

Acts of Ala. 1907, p. 530, approved July 31, 1907, and changing Code of 1907, Sec. 3044. By Act of Ala. approved July 27, 1907, (see Code of 1907, Vol. I, p. 1,) no Acts passed after July 9, 1907 shall be affected by the adoption of the code.

Shelby County, is the 6th District of the Northeastern Chancery Division. The Chancery Court sits at Columbiana, the county seat, on the first Thursday after the second Mondays in March and September, and may continue three days.

Code of 1907, sec. 3044.

Sumter County, is the 10th District of the Southwestern Chancery Division. The Chancery Court sits at Livingston,

the county seat, on the fourth Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Talladega County, is the 5th District of the Northeastern Chancery Division. The Chancery Court sits at Talladega, the county seat, on the first Thursday after the second Mondays in May and November, and may continue three days.

Code of 1907, sec. 3044.

The City Court of Talladega has equity jurisdiction in the county concurrent with the Chancery Court. When sitting in equity the procedure is the same as in the chancery court. This court holds one regular term in each year, commencing on the first Monday in September and ending on the last day of the succeeding June not a Sunday. The court may hold special or adjourned terms when in the opinion of the judges it is necessary to do so, of which ten days' notice is required but how notice is to be given is not specified. The judge may also take such recesses as he thinks proper. Acts of Ala. 1894-5, p. 1218. Acts of Ala. 1900-01, p. 1058, defines the powers of the register of the court. The court was created by Acts of Ala. 1892-3, p. 541.

Tallapoosa County, is the 3rd District of the Northeastern Chancery Division. The Chancery Court sits at Dadeville, the county seat, on the second Mondays in June and December, and may continue three days. Code of 1907, sec. 3044.

Tuscaloosa County, is the 4th District of the Northwestern Chancery Division. The Chancery Court sits at Tuscaloosa, the county seat, on the first Monday in May and the fourth Monday in October, and may continue one week.

Code of 1907, sec. 3045.

The Tuscaloosa County Court, has equity jurisdiction in the county concurrent with the chancery court. When sitting in equity the procedure is the same as in the chancery court. The Register of the Chancery Court at Tuscaloosa is ex officio register of this court. This court was created as the Tuscaloosa County Law and Equity Court, Acts of Ala. 1896-7, p. 262. But the name was changed to Tuscaloosa County Court by Local Acts of Ala. 1898-9, p. 878. Powers of the judge of this court to appoint a pro tempore judge and to ex-

change with judges of city courts elsewhere are granted by Acts of Ala. 1900-01, p. 714.

This court "shall hold two regular terms in each year, the first term beginning the first day of January and continuing until the first day of July of each year, the second term beginning on the first day of July and continuing until the first day of January next following." The judge may take such recesses and hold any special terms as he finds necessary. Local Acts of Ala. 1907, p. 498.

The Probate Court of Tuscaloosa County has been given concurrent jurisdiction with the chancery court in all matters of partition, division, or sale for division, with power to adjust equities. Local Acts of Ala. 1898-9, p. 1816.

Walker County, is the 2nd District of the Northwestern Chancery Division It may be that Winston County is also a part of the division, however (see Winston County, below). The Chancery Court sits at Jasper, the county seat of Walker County, on the first Monday in April and the third Monday in October, and may continue one week.

Code of 1907, sec. 3045.

The Walker County Law and Equity Court has equity jurisdiction in Walker County concurrent with the chancery court. When sitting in equity the procedure is the same as in the chancery court. The Register of the chancery court in Walker county is ex-officio the Register of this court. The court holds two regular terms in each year, the first beginning January 1, and continuing until July 1, and the second beginning on July 1, "and continuing until the first day of January of each year." The judge may take such recesses as he deems proper. Acts of Ala. 1900-01, p. 107. This Act was amended, Acts of Ala. 1900-01, p. 1112, and by Acts of Ala. 1907, p. 527. An attempt was made to abolish the court; Acts of Ala. 1903, p. 551; but this abolishing Act was held unconstitutional by the Supreme Court, in Norvell ex rel v. Brotherton, 143 Ala. 561.

The Circuit Court of Walker County has equity jurisdiction in the county concurrent with the chancery court. When sitting in equity the procedure is the same as in the chancery court. Local Acts of Ala. 1907, p. 723. Walker County, and

Winston County together form the 14th Judicial Circuit. Code of 1907, sec. 3244, but the terms set down in the Code of 1907 are repealed (see Code Vol I, p. 1,) by Act approved November 23, 1907. Local Acts Special Session 1907, p, 23, providing that the circuit court shall sit as follows: "In the County of Walker the first term shall commence on the second Monday in January, and may continue until but not including the third Monday in March; the second term shall commence on the second Monday in April and may continue until, but not including, the first day of July, the third term shall commence on the second Monday in October, and may continue until and including the second Saturday in December." The Act then prescribes sittings in Winston County (see below) and continues. "The equity docket of said circuit court in either Walker or Winston County may be called at any time fixed therefor by the judge of said court, provided the said equity docket must be called while the court is in session as above set out."

Washington County, is the 14th District of the Southwestern Chancery Division. The Chancery Court sits at St. Stephen, the county seat, on the first Mondays in March and September, and may continue three days.

Code of 1907, sec. 3047.

Wilcox County, is the 3rd District of the Southwestern Chancery Division. The Chancery Court sits at Camden, the county seat, on the second Mondays in March and September, and may continue three days. Code of 1907, sec. 3047.

Winston County, is or is not a part of the 2nd District of the Northwestern Chancery Division, as the Supreme Court may decide. Prior to an Act approved July 29, 1907, Acts of Ala. 1907, p. 515, Winston County with Walker County formed the second district of the Northwestern Chancery Division. Code of 1896, sec. 633. It was attempted by Acts of Ala. 1903, p. 400, to detach both Walker and Winston Counties from the Northwestern Chancery Division, but as to Winston County that Act would seem unconstitutional. (Const. 1901, sec. 147). The above Act of July 29, 1907, detached Winston County from the Northwestern Chancery Division, and bestowed equity jurisdiction upon the circuit court of

Winston County. But a subsequent Act approved August 2, 1907, Local Acts of Ala. 1907, p. 723, conferred equity jurisdiction upon "The circuit court in the counties of Walker and Winston," and provided that, the chancery cases might be disposed of in each county as provided in the Act. This Act provides that all laws and parts of laws in conflict are repealed. And as it is in conflict with the former Act of July 29, in providing that Winston equity cases may be heard at a different time, it would seem to repeal that Act, even to the extent of the detachment of Winston County from the Northwestern Chancery Division. If then the Act of July 29, 1907, was abolished, section 3045 of the Code of 1907 is correct, and Winston County is a part of the second District of the Northwestern Chancery Division, and the Chancery Court sits at Jasper, in Walker County for both counties as set forth above under Walker County. But if, that part of the Act of July 29, 1907, was not repealed by the Act of August 2, 1907, and Winston County remained detached, and it is not unconstitutional for it to be so, then section 3042 of the Code of 1907 is correct, and Winston County, like Lee County, is in no Chancery Division. The conflict between sections 3042, and 3045 of the Code of 1907 is in itself unimportant, since both the Act of July 29, and the Act of August 2, are unaffected by the enactment of the Code, having been passed after July 9, 1907, the date after which all Acts were to be excepted from the operation of the Code.

See Code of 1907, Vol. I, p. 1.

The Circuit Court of Winston County has equity jurisdiction, however, by Act approved August 2, 1907, Local Acts of Ala. 1907, p. 723, and the procedure in equity is the same as in the chancery court. The time of holding the circuit court is provided for Winston County as follows: "The Spring term shall commence on the fourth Monday in March, and may continue two weeks, and the Fall term on the fourth Monday in September, and may continue two weeks," the equity docket to be called at any time fixed therefor by the judge, provided it is called while the court is in session as above set out. Local Acts of Special Session of 1907, p. 23. The circuit court of Winston County sits at Double Springs, the county seat.

APPENDIX C.

Desirable Changes in Our Chancery Practice After the New Code of 1907*

The conclusion will be astounding to any one to whom it is new, that the line separating the field of procedure in equity from the field of jurisdiction of equity is impossible to draw. All will probably agree without the citation of definitons that procedure in equity is the sysem used by a court of chancery in enforcing the rights of which it takes cognizance. And Mr. Justice Story defined equity jurisprudence, which is the sense in which equity jurisdiction is here used, as "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law."[1]

But to avoid a definition which seems to point to the conclusion without arguing it, let us admit that equity jurisdiction is the division of our law affecting those rights of which a court of chancery takes cognizance.

Now it is true that the science of rights in the abstract is always much discussed in determining the field of jurisprudence. But the first step of every commentator is to determine what is meant by rights.[2] Of course he means legal rights. For jurisprudence is either limited by the field of legal rules and conduct, or it embraces ethics or matters of conscience. But Sir Frederick Pollock, in his little "First Book on Jurisprudence," has clearly explained to us that "Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another. And, in as much as human

*This appendix is a paper read by the author before the Ala. State Bar Assn. at Montgomery July 1, 1908, with certain modifications in the changes then recommended.

[1] Story of Eq. Jurisprudence § 25.

[2] Langdell's Brief Survey of Eq. Jurisdiction, Ch. 1, Cambridge, Mass., 1905.

beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual."[3] When attempts are made to extend the field of law beyond these limits of its efficiency we find such absurd examples as the order supposed to have been given by Dr. Keate to his boys at Eton. "Boys, if you're not pure in heart, I'll flog you."[4]

And it is no more absurd to create legal rules or rights incapable of enforcement because their infringment cannot be discovered, than to create rules incapable of enforcement for lack of the means.

A right without a remedy has long been the shibboleth of the common law; and it is needless to say that if there were such a thing, it would be valuless.

But the law is not guilty of such inconsistency. The notion has merely grown out of looseness of expression. The schoolmen tell us that rights are either absolute or relative. Absolute rights are rights to things; relative rights are rights which imply correllative duties. Rights and duties in this sense, are enforced and protected by legal remedies; and equity jurisdiction is a branch of the law of remedies.[5]

An injunction, then, is a remedy for enforcing a right; and it is at the same time a method of procedure of the court of chancery in enforcing the right. Discovery is a remedy to prevent fraudulent avoidance of debts. And at the same time, bills for discovery are distinct methods of procedure. And to take two examples on either side of the line but almost indistinguishable, the right of several lien creditors to submit their claims to the debtor's property to the adjudication of the court of chancery is a question of jurisdiction. Their right to submit their claims together is a question of procedure.

The theoretically perfect bill in equity consists of a true statement of facts, and a prayer for the proper remedy, in the exact form in which the remedy is afterwards given. There is no difference in form between the remedy sought by the bill and the remedy granted by the decree. Therefore the bill is always as truly a part of the remedy as is the decree;

[3] London, 1896, 44.

[4] Cited by Sir Frederick Pollock.

[5] Langdell Eq. Jur., 1.

for it is a step in obtaining it. And a change in the time or place of filing, and in the fullness or completeness of the bill, will not infrequently change the relief or remedy obtained by the decree. Now, there are certain steps or details which are uniform in obtaining all remedies, and these uniform steps or details are called pleadings or procedure.

These introductory observations are not intended to be academic, but are given to show us that the relation of procedure to jurisdiction is not the relation of form to substance, but rather the relation of detail to principle, its difference being a question of degree.

And it is believed that the common failure to note this, that changes in the rules of procedure are in fact changes in remedies, is chiefly responsible for unwise legislation upon the subject.

Of course all administration of justice can be improved; but only after long study should we conclude that important changes—changes which affect the principles, should be attempted. And never should clearly defined principles be changed until matters of apparent detail are remedied; for the full remedial effect of any change is not apparent until after experiment.

The spirit of sweeping reform in procedure at law or in chancery has never fully struck the South.[6] Just after the American Revolution, and probably as a reaction from the popularly believed despotic sway of chancellors in England, there was a tendency in some of our states to abolish courts of equity entirely. This was done in Massachusetts, as is well known, and in other States.

And the effect of the feeling is shown in some of the early Alabama Acts given in Aiken's Digest, notably the attempt to require all defenses to a cause in equity to be set up at once. The courts ran away from the law and construed "must" as "may," and the statutes later followed the courts. But even from the opportunity to file all defenses at once,

[6] Texas seems to be an exception and North and South Carolina after the Reconstruction. For an excellent summary of the history of the changes in all the States, see 16 CYC 24, note 7.

our practice has probably suffered more than from all its other peculiarities.

This influence of the American revolution upon equity, soon passed away, however, and it was not until over fifty years later that attempted scientific changes in procedure were made. Universal changes in the administration of justice were made about sixty years ago in New York and later in other States following her, and more conspicuously in England. And but for the distance of England away from us we should doubtless all have come under the influence of the reform movement which made such revolutionary changes there.

At the beginning of the reign of Queen Victoria two systems of jurisprudence were administered in England, one by the courts of common law, and the other by the courts of chancery, and which were substantially those in vogue in Alabama today. And they were in some respects antagonistic and even contradictory; so that they frequently justified the sarcasm of Lord Chancellor Westbury that we set up one tribunal to do injustice and another to stop it. But under the criticism of Bentham and Austin and other students more or less unfitted for practical discussion of the problem, an impulse for reform began which relieved the system of procedure of many apparent defects from time to time, until growing by the meat it fed upon the reform movement swept away all the old systems and substituted the new one under which justice is administered in England today.

The new system was instituted by the Judicature Act of 1873, and it reorganized all the courts of law in England. Under it and its many subsequent amendments "Law and equity can be administered by every branch of the court, and a suitor can no longer be bandied from one court to another, or lose his action merely because he has brought it in a wrong court or sought an inappropriate remedy. Nor can a suitor be deprived of a judgment which he has obtained at common law by an injunction in a court of equity, but every defense whether legal or equitable, can be raised in the court in which the action is brought."

Thus the virtue of the new system is described by Lord

Davey, one of the Lords Justices in the Court of Appeal instituted by the Judicature Act. The new system undoubtedly represented the best thought of English statesmen of the day, for it was carried through Parliament by Lord Selborne, the then Lord Chancellor, and Lord Coleridge, then Attorney General, and afterwards Lord Chief Justice, Sir George Jessel, Master of the Rolls, and the brilliant Lord Cairns, later a Lord Chancellor himself. The new plan totally abolished all existing systems of pleading, and substituted a system of rules applicable alike to all divisions of the court (for they still have a common law division, a chancery division and a probate division which consider the subjects broadly affected by those former divisions of the law) formulated by rules adopted in 1883 and subsequently amended, being now substantially as follows: 'The plaintiff by order of court delivers to the defendant, who has been duly summoned, his statement of claim, marked with the date of delivery, in which he must set forth concisely the facts on which he relies, and the relief which he asks. The defendant then delivers his statement of defense, in which he admits or denies the plaintiff's facts, and adds any new matter of defense. The plaintiff may then reply; and so on until the pleaders have exhausted themselves.' Demurrers were abolished, but either party may raise any point of law involved by the pleadings, and the judge decides whether it shall be determined before or after the trial.

In 1883, when the Ninth Edition of the British Encyclopedia came out, the praise of the new system was at its height. But twenty-five years have brought out its defects. In the 1903 Supplement to the British Encyclopedia, Lord Davey, longs for the former systems with appropriate reforms. He thinks "that the authors of the new system were too intent on uniformity when they abolished the common law pleading, which shorn of its abuses was an admirable instrument for defining the issue between the parties," and he misses the opportunity to try cases in chancery on bill and demurrer, without going into the facts. "Formerly" he says, "the pleader pleaded with the fear of demurrer before him. Nowadays he need not stop to think whether his cause of action or defense will hold water or not, and anything which is not obviously

frivolous or vexatious will do by way of pleading for the purpose of the trial and for getting the opposite party into the box."

And Sir Frederick Pollock in his last book[7] tells us that the new system has not turned out all that its originators prepared us to expect.

If the most conservative portion of the English speaking peoples, the fountain source of the common law and its systems of procedure, with the best learning of metropolitan life before them, have failed in revolutionary changes, we may hope that the spirit of reform will not so completely seize our legislature as to make them abolish fundamental rules of administering justice at one fell blow.

There seem to be four cardinal distinctions between chancery procedure in Alabama and the old chancery procedure in England.[8]

I. In Alabama causes in chancery are conducted between the parties exclusively, so that after a decree pro confesso for the failure of the defendant to plead, the plaintiff can obtain a final decree without proof of his bill;[9] whereas in England, the original prayer for relief was to the King to exercise his prerogative to do justice, and under the early practice the bill had to be proved in its substance without regard to the defendant.[10]

II. The plaintiff, having control of the issue without regard to the court, can waive the oath; whereas in England he could not do so without an order of the court.[11]

III. The court of chancery in Alabama has power to determine the whole subject of litigation between the parties without directing a collateral trial at law to determine a legal right.

[7] The Expansion of the Common Law. London, 1904.

[8] See Chapter 1 supra.

[9] Carradine v. O'Connor, 21 Ala. 573; McDonald v. Mobile Life Ins. Co., 56 Ala. 468; Baker v. Young, 90 Ala. 426; Johnson v. Kelly, 80 Ala. 135.

[10] 1 Daniell Ch. Pr. 569; Rose v. Woodruff, 4 Johns Ch. 547, citing the English practice prior to 1683.

[11] See § 13, supra.

IV. The defendant may incorporate all his defenses in his answer. This is allowed by Code of 1907, sec. 3115, but has come all down the line of codes from 1852.

It is apparent that all four of these changes go to the foundation of the subject, and if any of them have proven not to be improvements upon the originals, the quicker they are abolished the better for our practice. It is believed that the first and fourth are not improvements, the second requires modification, and the third only is a distinct improvement on the original.

Let us therefore examine them in detail:

I.

It is true that the change which gives us in brief the right to take a final decree in accordance with the allegations of the bill and without proof after a decree pro confesso, was not a change from the English practice at the time it began with us. The Statute, now Sec. 3163 of the Code of 1907, defining what decrees pro confesso shall mean, which came down from the Act of 1841, shown in Clay's Digest,[12] says that the facts are admitted except in case of minors, insane persons, and executors and administrators, and it adds "and bills for divorce." But that merely amounted to saying there could be no effective decree pro confesso against minors, insane persons, or executors, or in a divorce case. And the courts so held with reference to infants.[13] The new section 3164, authorizing the chancellor to give a final decree in vacation on a decree pro confesso and testimony in divorce cases, in effect repeals the exception by recognizing a decree pro confesso in divorce cases, but it recognizes the necessity for testimony also. The statute is therefore self contradictory. But while the English practice at the time of the orders of 1845, made a decree pro confesso an absolute confession of the allegations constituting the equity of the bill,[14] by the early Alabama laws and practice, the early English practice was followed, and the important averments of the bill had still to

[12] 354 § 58.

[13] See § 367, ante.

[14] 1 Daniell Ch. Pr. ch. X; Langdell Eq. Pl. § 84.

be proved without regard to the defendant.[15] This was enacted in 1823.

But whatever the present statute says, the dangers in allowing a final decree on a decree pro confesso without the testimony, are many. For example, the plaintiff can allege a joint title to a piece of property in himself and an uninterested or non-resident defendant, and without any proof whatever, have the property divided or sold for division. And almost every suit upon real property titles gives similar opportunities.

Generally the matter could be straightened out by more litigation; provided it were done before the statutes of limitation have operated. But why leave the court open to such frauds?

II.

Our second change from English practice, the right of the plaintiff to dispense with the defendant's oath presents more difficulties. It is probably generally recognized that the ordinary answer not under oath, merely denies the plaintiff's important positions, without making more than a colorable attempt to state the truth about them, and is given up entirely to stating the defendant's affirmative defenses. Under our statutes and decisions an answer not under oath is mere pleading, so that the plaintiff cannot except to its sufficiency in replying to his statement; and the outcome is that the plaintiff has to bring into court innumerable witnesses or records to prove what the defendant could have verified out of court with much less trouble and expense. Of course the weight of an oath does not amount to what it did 100 years ago. But it is sufficient still to prevent a defendant from denying facts which he knows the plaintiff can prove, even though laboriously; and it prevents him from setting up many false and frivolous defenses.

Section 3117, of the Code of 1907, which was new in the Code of 1896, provided that if the plaintiff swear to his bill, the denials of the answer under oath should not have their

[15] Aiken's Digest, 288, § 18.

historic value which required the testimony of two witnesses to be overcome, but would amount to nothing more than the defendant's deposition. And this excellent device, when it becomes familiar to the bar, may go far towards dispensing with answers under oath. But if the plan is good, why not extend it? Why not require the plaintiff to swear to every bill, and require the defendant to swear to every answer? And then reinstate the old English practice by which the court on application or petition could allow an answer to be filed without oath, on consent of the opposite party;[16] which privilege could also be extended to allowing a bill to be filed without oath if the chancellor on reading it concluded that the cause might be speeded by deciding the cause upon mere pleading as now.

In such a practice it might be well also to allow the bill to be the plaintiff's deposition to the extent of matters contradicted in the answer. But this should be more carefully considered.

III.

We may omit elaborating the third change in English practice, noted above, the power of an Alabama court of equity to decide all collateral questions arising in the cause without directing a special or feigned issue at law, because we probably all agree that this change was an improvement. The most common instances were suits for injunctions involving the fact of the nuisance against which the plaintiff seeks relief, and suits for injunctions involving the plaintiff's right to damages for the nuisance in the past. To require these questions to be referred to the law courts would give rise to delay only. Indeed there must ultimately be devised a plan by which a plaintiff who has misconceived his remedy and applied to equity for his principal relief when he should have sought his remedy at law, can transfer his cause without starting all over again.

The paralysis inflicted upon justice by the time honored final decree of a court of chancery that the plaintiff had a

[16] 2 Daniell Ch. Pr. 846.

remedy at law, probably did more than any other cause to lead the English to consolidate their courts and abolish all existing modes of procedure. Sub. Section 2, of section 11 of the Act of 1875, replacing section 35 of the English Judicature Act, which gave the plaintiff the option to select the division in which he would sue, is almost alone a justification of the new English system. It is, with slight abreviation, as follows:

"(2) If any Plaintiff shall assign his cause * * * to any division of the high Court to which according to the rules of court or provisions of the principal Act * * * the same ought not to be assigned, the court or any judge of such division upon being informed thereof may on a summary application at any stage of the cause or matter direct the same to be transferred to the division of the said court to which according to such rules or provisions the same ought to have been assigned * * * and all steps and proceedings whatever taken by the plaintiff * * * or by any other party in any such cause * * * and all orders made therein by the court * * * before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same had been taken * * * in the proper division of the said court."

Of course the full benefit of such a plan could not be obtained without abolishing all differences in procedure between equity courts and law courts. But there would seem to be no fundamental difficulty in providing in Alabama that when it appears in a suit in chancery that the plaintiff has a remedy at law which precludes his pursuing his chancery suit, the court may grant him leave to transfer his suit to a court of law upon such terms as the court deems just and to amend his pleading by filing in the law court a common law declaration as he may be advised. The joining of more than one plaintiff or defendant may be corrected by orders of severance. By this means the expense and delay incident to new service, and the bar of statutes of limitation may be avoided, without any substantial injustice being done. This method seems to have been adopted in Kentucky before their constitution of 1891, which abolished separate courts of chancery.[17]

[17] See 16 CYC, 24, note 7.

IV.

That brings us to the fourth and last fundamental change our Alabama procedure has made upon the old English Original—the right to the defendant to incorporate all his defenses in his answer.[18] As has been already stated, this statute providing that the defendant may incorporate all his defenses in the answer is a modification of the early law in Aiken's Digest providing that the defendant must incorporate all his defenses in his answer; and that was evidently an early crude attempt to abolish technical chancery procedure. The Act of 1823 (see Aiken's Digest, 287) "to regulate proceedings in chancery suits" provided that "no plea or special demurrer shall be filed to any bill or answer, but it shall be lawful for defendant to embrace all the matter of his plea and demurrer, either general or special, in his answer and shall have the same benefit thereof as if the same had been pleaded."

But a demurrer filed with the answer is never of the same benefit to the defendant; for if it is a general demurrer for want of equity, it is rendered unnecessary by the answer, as no suit can obtain a final decree of relief if without equity; and if it is a bad demurrer, it is useless. While if it is a good demurrer, the chancellor will allow an amendment, and thus probably make the defendant answer again. Or if the chancellor disregards it, and renders a final decree on some one point of the cause, even then the Supreme Court will presume that the multifarious part of the bill was abandoned below.[19] And if the demurrer were on the matter of parties; it is the pretty well settled rule of our court that a bill will never be dismissed for want of parties without giving the plaintiff leave to amend.[20]

If then filing the demurrer with the answer does not cut off some important amendment, the practice does not help the defendant.

A plea filed with the answer on the other hand, if not an

[18] Code of 1907, § 3115; Code of 1896, § 699.

[19] Betts v. Betts, 18 Ala. 787.

[20] The decisions when the point is raised in the lower court are too numerous to need citing.

insufficient plea, filed as a trick to take advantage of an inexperienced pleader under the decision in Tyson v. Decatur Land Co., 121 Ala. 418, is of no advantage to the defendant at all. In its nature a plea is a single defense, which he files separately in order to avoid the trouble of answering; but if he is going to file it with all his other defenses after answering, why single it out as a plea? The committee of the last legislature for revising the Commissioner's work have attempted to avoid the effect of Tyson v. Decatur Land Co., by providing somewhat elaborately that the plaintiff shall never suffer from a bad plea; and that he need not test its sufficiency, apparently whether incorporated in the answer or offered separately. But as the court only can decide whether any plea is good or not, the new law seems to result in greatly limiting the value even of separate pleas; for the defendant would be very foolish to take testimony to prove his plea until it is held to be good; for if he fails to prove it, he is out of court; and the plaintiff would be very foolish to test the sufficiency of the plea if he does not have to; for the defendant will then be forced to answer fully and the plaintiff may find out some facts which he did not know.[21]

The whole section 3115 would seem of doubtful value.

The right to incorporate a plea or a demurrer in the answer has been added in the new Code of 1907, to section 3128, also (708 of the Code of 1896) upon answers to amendments. Of course this should be stricken out also if section 3115 is abolished.

Although the above recommendations affect the principles rather than the details of procedure, with the exception of that upon the transfer of causes and the extension of the statutes authorizing the oath to the bill, they are all returns to the English original; the conception being that the changes have not been justified.

Of course there have been many changes in detail in every successive Code which were admirable. And it is probable that many wise additional changes could be made.

[21] For full discussions upon the inadvisability of incorporating demurrers or pleas in answers. see §§ 448, 469, ante.

Primarily any new plan which serves to speed the cause, is desirable, provided it does not interfere with the clearness of the pleadings and the exactness of the issue.

Statutes upon the following points would seem desirable, although the exact wording should be left to the committee who draft them.

I.

Our statutes provide no time within which a plaintiff must take the next step after the defendant answers. If the court is in vacation either party may set down a demurrer or plea on ten days' notice (Rule 74); and in term time, of course it can be done on motion, (except in Jefferson County, where the court has a printed docket and is testing several rules of its own). But if the plaintiff has a dilatory solicitor the case may be unduly delayed. Therefore a rule would do much good providing that within thirty days after the filing of the answer the plaintiff must take the next step in the cause, by filing a motion to set the cause down for hearing on bill and answer, or by filing interrogatories to his witnesses, or if he desires to take his testimony orally, by having his witnesses summoned, or by filing a supplemental bill, or an amendment to his bill, or other appropriate pleading; and if it shall appear to the chancellor that the plaintiff has taken any steps for the purpose of delay merely, the court must impose terms upon the plaintiff, not to exceed the total costs incurred, in lieu of dismissing the suit. If there are more answers than one, the plaintiff should be required to take the next step within thirty days after the time at which he became entitled to take a decree pro confesso against the defendant not answering. Such a rule would take the place of the rule days in old English practice and in the Federal Courts.

II.

The present practice of allowing an heir, legatee, or creditor of an estate of a decedent to remove the administration into chancery at any time without alleging any reason, has proven a delay to justice by changing a proceeding in rem, the administration of an estate in the probate court, into a pro-

ceeding in personam in the chancery court, entailing the delay or personal service, and frequently new publication to non-residents and taking of decrees pro confesso. The present practice began with the decision of the court in the cause of Baker v. Mitchell, 109 Ala. 490, in which the court seems to have misconstrued the earlier decisions of the court, which allowed estates to be removed into chancery at any time for equitable questions arising, or by heirs or legatees when they sued to compel settlements. If no equitable matter is involved, and the time has not elapsed for the administrator to settle, and there is no reason to remove him, why disturb him? The old law should be re-instated.

III.

Neither the plaintiff nor the defendant should be allowed more than one appeal based upon an interlocutory decree sustaining or overruling a demurrer, saving him the same benefit he has now on appeal from a final decree, of errors in sustaining or overruling any demurrers wrongfully. This will tend to make the plaintiff plead carefully, and will prevent the defendant from taking dilatory appeals; for unless the chancellor has made a glaring mistake the defendant will always be saving his appeal for a more patent error in overruling a demurrer after some future voluntary amendment by the plaintiff.

Appeals from decrees upon pleas, however, may be left as now; for whenever a plea is sustained in either the lower or the upper court, the cause is over but for the proof of it, (of which there will be little doubt); and if the plea is overruled, the defendant can not amend it, except possibly to heal defects of mere form.

IV.

It would seem wise to restore the right to test the equity of the defenses of an answer as was allowed under the English practice. This was done not by demurrer, but by setting down the cause for hearing upon bill and answer. Our statute now section 3116 of the Code of 1907 long ago prevented this by making the answer true only so far as re-

ponsive to the allegations of the bill. It should be amended by providing that all defensive matter shall be taken as true when the cause is heard on bill and answer. This is fully discussed in Chapter XX, ante.

Finally, notwithstanding much good work done upon our chancery procedure by the commissioner and the committee who prepared the new Code of 1907, notably changes authorized in procedure upon suits for injunctions, sections 4528, et seq. (which seems in substance to give the chancellor the option of pursuing the federal practice with improvements), and the addition to section 3118, abolishing the hitherto necessary service of summons on cross-bills to plaintiffs in the original bill, there are some changes introduced into the new Code which seem ill advised.

I. Section 3115, comprising section 699 of the last Code upon the incorporation of all defenses in the answer, and new additions abolishing the necessity of testing the sufficiency of pleas, has already been discussed.

II. Section 3121, abolishes our motion to dismiss for want of equity, and re-instates the old general demurrer for want of equity. This would be harmless enough, unless a decree upon a general demurrer comes under the influence of our statutes of amendments, whereas a decree upon a motion to dismiss does not.

Since the decision in Turner v. Mobile, 153 Ala. 73, it had become settled law that after a decree sustaining a motion to dismiss for want of equity, the plaintiff had no more right to amend his bill, but was out of court. This was the rule in old English practice upon a decree sustaining a general demurrer for want of equity. So in fact our motion to dismiss was the same as the old English general demurrer, whereas the general demurrer with the right to the plaintiff to amend is a new creation.

If the plaintiff can amend to put equity in his bill, a clever pleader can hold a defendant in court in a complicated property case for years if he desire it, by adding a little more color of equity each time, until the defendant is worried into a compromise in order to have his property free from litigation.

It has been said that a construction of the new statute by the

court is expected in accordance with that formerly held to apply to motions to dismiss. But if so, to change the pleading without prescribing that the effect of the former pleading shall be retained by the substitute was dangerous.

III. Section 3128, with reference to pleading to amendments is new in providing what seems not to have been contemplated by the old Statute, section 708 in the Code of 1896, that the plaintiff may require the defendant to answer and not demur or plead; and then further provides that the defendant's pleadings after an amendment is allowed shall be taken as an amendment of the former defenses. This seems to provide hopeless confusion.

Hitherto with us, as in the old English pleading, an amendment to a bill wiped out all prior pleading by the defendant and presented a new bill for him to defend. He was required to plead to the bill as amended, and not to the amendment.

Even if the bill was good on demurrer at first, why might it not be bad again? And yet the defendant can be forced to answer it. Again the defendant may have demurred before, and may find it wise to plead after the amendment, unless the plaintiff requires him to answer, then is his plea an amendment to his demurrer?

The courts may work some systematic interpretation into the new matter, but the section would seem to have been best as it was in section 708, of the Code of 1896.

IV. Secton 3212, is new, and it is possibly broader in its effect than was intended. The doubtful feature is that the chancellor may in rendering his final decree, grant relief as the equity and justice of the case may require, in favor of one or more complainants.

The general rule heretofore has been that all plaintiffs must be entitled to recover, or none can do so, except probably in creditors' bills.

And while the old rule itself probably arose out of confusion of joint suits on joint claims at law, and should be modified, the new section goes too far in that it may authorize a difference between suits in equity and suits at law on joint claims. It was hardly intended that a defense which would bar suit by partnership or by two joint payees on a note

at law, because it was a good defense against one of them, would not be a good defense in equity. The remainder of the section, authorizing the court of its own motion to direct an amendment, or to require further testimony seems a great improvement.

As no changes to our procedure can be made until the meeting of the Legislature in 1911, it is possible that many of the above suggestions may become unnecessary at that time, on account of the Supreme Court having construed the statutes in the safest way. But his article will not have been idle if it directs public attention to the dangers, for many able advisors may then help the court to work out all for the best.

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